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July 21, 2021

VIA ECF

The Honorable John G. Koeltl
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *United States v. Dave Minter*, No. 20-cr-389 (JGK)

Dear Judge Koeltl:

We respectfully submit this letter on behalf of defendant Dave Minter in advance of his sentencing scheduled for August 11, 2021 at 10:30 A.M.

Mr. Minter was arrested in the instant case on April 26, 2020. The Indictment charged Mr. Minter with one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(e), to which Mr. Minter pled guilty without a plea agreement on April 28, 2021. As this Court is aware, the reason that Mr. Minter declined a plea agreement is that the government continues to insist that he is subject to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(A), despite the clear weight of the law to the contrary. The resolution of this legal question is critical given the fifteen-year mandatory minimum sentence that would be required if the ACCA were applied. Without the application of the ACCA, the parties agree that the otherwise applicable offense level would be 21 – resulting in a guideline range of 70-87 months or less than half of the 180 months for which the government now advocates.

As discussed in detail below, we respectfully submit that the appropriate offense level is 21 and a below-guideline sentence is appropriate.

I. THE ARMED CAREER CRIMINAL ACT IS INAPPLICABLE HERE.

The guideline range as calculated in the Presentence Report ("PSR") is based on an erroneous application of the ACCA. Specifically, the PSR's characterization of Mr. Minter's 2014 conviction under NYPL § 220.39 as an ACCA predicate offense is contrary to prevailing law,

which dictates that this conviction is not a "serious drug offense" under the ACCA because of differences between the New York and federal controlled substances statutes.

A. Mr. Minter's 2014 Conviction Under NYPL § 220.39 is Not a "Serious Drug Offense" Under the ACCA.

The ACCA defines a "serious drug offense" as including "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," as defined in the Controlled Substances Act ("CSA"). 18 U.S.C. § 924(e)(2)(A)(ii). Consequently, unless a state drug offense involves substances controlled by the CSA, it does not constitute a "serious drug offense" predicate under the ACCA. *See United States v. Ojeda*, 951 F.3d 66, 73 (2d Cir. 2020) (providing that the state offense must involve a "federally recognized" controlled substance); *see also United States v. Townsend*, 897 F.3d 66, 68 (2d Cir. 2018) (holding that "'controlled substance' under U.S.S.G. § 4B1.2(b) refers exclusively to substances controlled by the CSA").

Mr. Minter's 2014 conviction was under NYPL § 220.39(1), which provides: "A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells . . . a narcotic drug." NYPL § 220.39(1). Section 220.39(1) is an indivisible statute and, consequently, the categorical approach applies in determining whether the offense is an ACCA predicate. *See United States v. Swinton*, 495 F. Supp. 3d 197, 205 (W.D.N.Y. 2020) ("NYPL § 220.39(1) is indivisible and thus, applying *Townsend*, the categorical approach must be used and the inquiry is limited to whether a 'narcotic drug' under NYPL § 220.39(1) is a categorical match with the CSA's definition"); Ex. A, Sent'g Tr. at 6-12, *United States v. Baez-Medina*, No. 20-CR-24 (S.D.N.Y. July 1, 2021) (Koeltl, J.) (applying the categorical approach in determining whether a conviction under NYPL § 220.39(1) is a predicate "controlled substance offense" under the Guidelines); *see also Pascual v. Holder*, 707 F.3d 403, 405 (2d Cir. 2013), *adhered to on reh'g*, 723 F.3d 156 (2d Cir. 2013) (using the categorical approach to determine whether a conviction under NYPL § 220.39(1) constituted a drug trafficking crime under the CSA). Under the categorical approach, a state offense is not a "serious drug offense" under the ACCA if the state statute criminalizes ***any substance*** that is not federally scheduled. *See Townsend*, 897 F.3d at 74 (under the categorical approach, "the state law must criminalize ***only*** those substances that are criminalized under federal law") (emphasis added).

Consequently, to determine whether Mr. Minter's 2014 conviction is an ACCA predicate, the Court must compare the definition of "narcotic drug" in NYPL § 220.39(1) with the CSA schedules to determine whether there is overbreadth with respect to any controlled substance. As discussed in detail below, the prevailing law is to compare the schedules at the time of sentencing, rather than at the time of the prior conviction. There is no dispute that if this Court applied the "time of sentencing" analysis, the ACCA would be inapplicable because the current CSA schedules are different from the New York schedules. Thus, the government urges this Court to compare the schedules at the time of conviction and argues that the CSA schedules and New York schedules at that time were aligned. As this Court recently found, however, that argument also

fails. *See* Ex. A, Sent'g Tr. at 6-12, *United States v. Baez-Medina*, No. 20-CR-24 (S.D.N.Y. July 1, 2021) (Koeltl, J.) (holding that the New York schedules were categorically broader than the federal schedules at the time of defendant's conviction, in controlling certain cocaine isomers which the federal schedules did not). In short, there can be no question that the ACCA is inapplicable here.

1. The Relevant Controlled Substance Schedules Were Inconsistent in 2014.

Even if this Court compares the New York and federal schedules at the time of Mr. Minter's 2014 conviction, there was an inconsistency which would render the ACCA inapplicable. As this Court recently held in *Baez-Medina*, there was overbreadth between the New York and federal schedules of controlled substances in 2011 (and still today) because New York then, and now, defined "narcotic drug" to include certain isomers of cocaine that were different from those controlled by the CSA. Ex. A, Sent'g Tr. at 6-12, *United States v. Baez-Medina*, No. 20-CR-24. (S.D.N.Y. July 1, 2021) (Koeltl, J.).

In *Baez-Medina*, this Court determined that New York's definition of "narcotic drug" in place in 2011 included a broader range of cocaine isomers than the CSA. *Id.* at 9 ("The New York state statute controls cocaine and all isomers of cocaine; while the federal statute controls only the optical and geometric isomers of cocaine."). The Court analyzed whether a 2011 conviction under NYPL § 220.39(1) was a "controlled substance offense" to determine whether the conviction was a predicate offense for an enhancement under Section 2K2.1(a)(2) of the Sentencing Guidelines. *Id.* at 6-11. Under a categorical approach, the court compared New York's definition of "narcotic drug" with the CSA schedules in both 2011 and 2021 to identify overbreadth. The Court noted that "under a plain reading of the New York statute, and when considering the legislative history and intent of the provision, the New York statute controlled all isomers of cocaine, while federal law only controls geometric and optical isomers of cocaine." *Id.* at 10 (citing *United States v. Fernandez-Taveras*, No. 18-CR-455 (NGG), 2021 WL 66485, at *5 (E.D.N.Y. Jan. 7, 2021)). Thus, the Court held that a 2011 conviction under NYPL § 220.39(1) "cannot be considered a controlled substance offense pursuant to Sentencing Guideline Section 2K2.1(a)(2)." *Id.* at 11. The Court found that it was "unnecessary to answer" whether the time-of-conviction or time-of-sentencing approach applied "because the broader inclusion of isomers of cocaine render the New York statute broader than its federal counterpart at the time of the defendant's 2011 conviction and today." *Id.*

As this Court recognized in *Baez-Medina*, a recent Eastern District of New York decision also held that New York's definition of "narcotic drug" in place in 1998 included a broader range of cocaine isomers than the CSA. *See Fernandez-Taveras*, 2021 WL 66485, at *6 (holding that a conviction under NYPL § 220.18 failed the categorical analysis because "the New York statute applies on its face to cocaine isomers to which the CSA does not"); *see also United States v. Holliday*, No. 20-30048, 2021 WL 1511274, at *2 (9th Cir. Apr. 16, 2021) (holding that a Montana drug offense was not a "controlled substance offense" predicate under U.S.S.G. § 4B1.2(b), since

"the Montana drug schedules are facially overbroad because they include more varieties of cocaine than the federal schedules").[1]

The holdings in *Baez-Medina* and *Fernandez-Taveras* squarely apply here and render the ACCA inapplicable. The definition of "narcotic drug" applicable to NYPL § 220.39(1) on the date of Mr. Minter's 2014 conviction (and also today) included certain non-federally-scheduled isomers of cocaine and is thus categorically broader than the CSA. Consequently, just as in *Baez-Medina* and *Fernandez-Taveras*, Mr. Minter's 2014 conviction fails the categorical approach and, therefore, is not a predicate offense under the ACCA. Thus, Mr. Minter maintains that, under either the time-of-sentencing analysis that he proposes or the time-of-conviction analysis that the government advances, the ACCA is inapplicable.

2. It is Undisputed That ACCA Would Be Inapplicable Under a "Time of Sentencing" Analysis.

The government has previously conceded in both the Southern and Eastern Districts of New York that a 2015 modification in federal law rendered the applicable definition of "narcotic drug" under New York law categorically broader than the federal schedule of controlled substances, such that a NYPL § 220.39(1) conviction could no longer serve as a predicate to the Sentencing Guidelines' career offender enhancement, which would accordingly also bar application under the ACCA. *See* Ex. B, Gov't Sent'g Letter at 3, *United States v. Devane*, 19-CR-244 (FB) (E.D.N.Y. Nov. 30, 2020), ECF No. 25 (the government joining in an objection to the PSR because "[u]nder controlling Circuit precedent, this drug offense is not a 'controlled substance offense' under the Guidelines because the New York drug statute currently criminalizes the sale of certain substances that are not criminalized under federal law"); Ex. C, Gov't Sent'g Letter at 4, *United States v. Disla*, 20-CR-222 (AKH) (S.D.N.Y. Nov. 30, 2020), ECF No. 23 (the government agreeing that the defendant's prior narcotics conviction did not constitute a "controlled substance offense" and accordingly agreed a lower Guidelines range was proper).

Specifically, it is undisputed that New York's current definition of "narcotic drug" is overbroad because it includes Naloxegol, which was removed from the CSA schedules in 2015, thus precluding the classification of Mr. Minter's 2014 conviction as a "serious drug offense" under the ACCA. *See Swinton*, 495 F. Supp. 3d at 205-06 (finding that a conviction under NYPL § 220.39 is categorically broader than one under the CSA because "New York criminalizes the sale of Naloxegol, while federal law does not").

[1] Additionally, we understand that on July 21, 2021, Judge Buchwald similarly held in *United States v. Ferrer* that a New York drug offense was not a predicate "controlled substance offense" under the Guidelines based on the same cocaine isomer distinction discussed in *Baez-Medina* and *Fernandez-Taveras*. *See United States v. Ferrer*, No. 20-CR-650 (S.D.N.Y. July 21, 2021) (Buchwald, J.). We will provide the Court with the sentencing transcript from *Ferrer* once the transcript is available.

Thus, if the Court were to apply a "time-of-sentencing" analysis here, Mr. Minter would not qualify as an Armed Career Criminal because of this 2015 distinction between the state and federal schedules of controlled substances, which still exists. We believe that time of sentencing is the proper analysis and is consistent with prevailing law. Nearly every recent court that has addressed this issue in the context of criminal sentencing has applied the time-of-sentencing analysis. *See, e.g.*, *United States v. Abdulaziz*, 998 F.3d 519, 531 (1st Cir. 2021) (applying a time-of-sentencing approach and holding that defendant's prior conviction was not a "controlled substance offense" for the purposes of a sentencing enhancement under the Guidelines where hemp was not included in the CSA's schedules at the time of sentencing); *United States v. Holliday*, No. 20-30048, 2021 WL 1511274, at *2 (9th Cir. Apr. 16, 2021) (finding that a prior state offense was not a "controlled substance offense" under the Guidelines, where Montana's drug schedules included substances that the federal schedules did not at the time of sentencing); *United States v. Williams*, 850 F. App'x 393, 398 (6th Cir. 2021) ("Thus, the district court should have employed the schedule (federal or state) effective at the time of sentencing."); *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) ("Thus, a court must ask whether [the defendant's] prior crime qualifies as a 'controlled substance offense' under the CSA and the corresponding Guideline *at the time of sentencing*."); *Swinton*, 495 F. Supp. 3d at 206 (finding that a time-of-sentencing approach should apply); Ex. D, Sent'g Tr. at 14, *United States v. Santana*, No. 1:18-cr-865 (S.D.N.Y. July 13, 2020) (Caproni, J.) (holding that the "determination [must] be made at the time of sentence"); Ex. E, Sent'g Tr. at 19, *United States v. Rollins*, Nos. 1:11-CR-251, 1:19-CR-34 (W.D.N.Y. July 1, 2020) (Skretny, J.) (holding that time-of-sentencing is the proper approach); Ex. F, Sent'g Tr. at 25, *United States v. Butler*, No. 1:19-CR-177 (S.D.N.Y. Feb. 12, 2020) (Daniels, J.) (applying the time-of-sentencing approach); Ex. G, Sent'g Tr. at 9, *United States v. Gibson*, No. 1:19-CR-66 (W.D.N.Y. Jan. 31, 2020) (Vilardo, J.) ("applying the current law is the way to do it"); Ex. H, Sent'g Tr. at 4-6, *United States v. Augustine*, No. 17-CR-753 (S.D.N.Y. Sept. 19, 2019) (Seibel, J.) (refusing to apply the career offender guideline based on a distinction between New York's definition of a "narcotic drug" at the time of the prior state conviction and the time of sentencing). *But see* Ex. I, Sent'g Tr. at 14, *United States v. Rodriguez*, No. 18-CR-895 (S.D.N.Y. Sept. 19, 2019) (Kaplan, J.) (agreeing with the government that a time-of-conviction approach applies); Ex. J, Sent'g Tr. at 9-10, *United States v. Ferrer*, No. 17-CR-773 (S.D.N.Y. Nov. 16, 2018) (Koeltl, J.) (applying a time-of-conviction approach).

In applying the time-of-sentencing approach, courts have consistently held that "the entire structure of the Guidelines in 18 U.S.C. Section 3553(a)(4)(A)(ii) requires that determination be made at the time of sentence." Ex. D, Sent'g Tr. at 14, *Santana*, No. 18-CR-865(S.D.N.Y. July 13, 2020) (Caproni, J.); *see also Swinton*, 495 F. Supp. 3d at 209 ("a sentencing court must apply the Guidelines in effect at the time of sentencing."); Ex. E, Sent'g Tr. at 19, *Rollins*, Nos. 1:11-CR-251, 1:19-CR-34 (W.D.N.Y. July 1, 2020) (Skretny, J.) ("The structure of the guidelines is such that you be assessed under the current state of the law."). Consistent with that general sentencing principle, the definition of "controlled substance" should be "'interpreted according to a uniform, national definition,'" not a no-longer-operative definition that was applicable on the date of conviction. *See Williams*, 850 F. App'x at 397 (quoting *United States v. Martinez*, 232 F.3d 728, 732 (9th Cir. 2000)). As the court explained in *Santana*, "[i]t would make no sense for

two defendants sentenced on the same day, with the same offense, with the exact same criminal history, to have different [sentences] because one previous conviction, in which state and federal offenses were the same, and one previous conviction which was different." *See* Ex. D, Sent'g Tr. at 14-15, *Santana*, No. 1:18-CR-865(S.D.N.Y. July 13, 2020) (Caproni, J.); *see also* Ex. F, Sent'g Tr. at 25, *Butler*, No. 1:19-CR-177 (S.D.N.Y. Feb. 12, 2020) (Daniels, J.) (providing that comparing "the law as it existed at the time of the offense . . . is inherently problematic" as it "could create consequences that are unintended and inconsistent for the determination of the applicable [sentencing] range").

While some courts, including this one, have previously relied on *Doe v. Sessions*, 886 F.3d 203 (2d Cir. 2018), which endorsed a time-of-conviction approach in the immigration context, we respectfully submit that the reasoning underlying *Doe* does not extend to the criminal sentencing. Specifically, in *Doe*, the court held that for immigration removal proceedings, the schedules should be compared at the time of conviction, rather than at the time of removal, because that approach "provides both the Government and the alien with maximum clarity at the point at which it is most critical for an alien to assess (with aid from his defense attorney) whether 'pending criminal charges may carry a risk of adverse immigration consequences.'" *Id.* at 210 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010)). Here, by contrast, the moment that a defendant needs clarity is not at the time he is convicted of a potential predicate crime, but rather when he is evaluating the consequences of a conviction on his current charge. *See, e.g.*, *Abdulaziz*, 998 F.3d at 531 (distinguishing *Doe* because "there is no similar concern in [the criminal sentencing] context", since the consequence of a prior state conviction "results only if a defendant commits a new crime"); *Williams*, 850 F. App'x at 400 ("Also distinct are immigration cases holding that courts should apply the time-of-conviction federal drug schedule"); *Swinton*, 495 F. Supp. 3d at 209 ("[t]he factual premise of Doe would not apply in this context").

In other words, in the immigration context, the conviction at hand would trigger removal and thus it makes sense to have clarity at that point. Here, the underlying charge would not trigger the applicability of ACCA, but rather it is triggered by a subsequent conviction. Thus, that is the point at which a defendant must be able to make an informed decision on whether to plead guilty. Defendants should not be put in the position that Mr. Minter found himself in here – having to make a decision to plead guilty without clarity of whether his arguments that ACCA is inapplicable would prevail.

Due to the cocaine isomer distinction, the Court need not necessarily decide whether the time-of-conviction or time-of-sentencing approach applies, however, we believe that the Naloxegol distinction provides another basis for finding that Mr. Minter's 2014 conviction is not an ACCA predicate and that time of sentencing is the proper analysis under the prevailing law outlined above. While those cases generally arise in the context of Guidelines-based sentencing enhancements, the rationale underlying the application of the time-of-sentencing approach in such cases applies equally to the ACCA. *See United States v. Evans*, 924 F.3d 21, 29 n.4 (2d Cir. 2019) (stating that we "look[ ] to cases analyzing ACCA's elements clause to interpret . . . § 4B1.2 of the Guidelines"); *United States v. Moore*, 916 F.3d 231, 241–42 (2d Cir. 2019) (relying on cases

construing ACCA's force clause in construction of guideline counterpart). Moreover, we have not identified any case where a court applied the time-of-conviction analysis in the ACCA context. Consequently, Mr. Minter maintains that under the time-of-sentencing analysis, the Naloxegol distinction provides an independent reason for finding that the ACCA is inapplicable.

B. Because the ACCA Does Not Apply, Mr. Minter's Guideline Range is 70-87 Months.

As Mr. Minter is not subject to the ACCA, the U.S.S.G. § 4B1.4(b)(3)(B) enhancement does not apply and Mr. Minter's guideline range must be adjusted accordingly. (*See* PSR ¶ 28.) Without the Section 4B1.4(b)(3)(B) enhancement, Mr. Minter's total offense level is 21, resulting in a recommended sentencing range of 70-87 months based on a criminal history category of V. (*See id.* ¶¶ 27-30.)

II. A DOWNWARD DEPARTURE UNDER § 4A1.3(b)(1) IS WARRANTED.

In determining an appropriate sentence, courts must undertake a three-step process: (1) determine the applicable sentencing range under the Guidelines; (2) consider whether any departures from the Guidelines would be consistent with guideline policy statements and commentary; and (3) consider the other factors listed in 18 U.S.C. § 3553(a) to "impose a sentence sufficient, but not greater than necessary" in light of such factors. 18 U.S.C. § 3553(a); *see also* U.S.S.G. § 1B1.1.

Should the Court find that the ACCA is inapplicable, a downward departure is warranted under U.S.S.G. § 4A1.3(b)(1) because Mr. Minter's criminal history calculation substantially overrepresents the seriousness of his criminal history. In particular, the criminal history calculation places too much weight on Mr. Minter's two prior robbery convictions, which occurred sixteen and twelve years prior to the instant offense, resulting in a drastically increased offense level and criminal history category, and an unreasonably harsh recommended sentencing range.

Pursuant to Section 4A1.3(b)(1), a downward departure is appropriate if "the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3(b)(1); *see also United States v. Hernandez*, No. 04 CR. 424-20 (RWS), 2005 WL 1423276, at *6 (S.D.N.Y. June 13, 2005) ("[T]he Sentencing Commission recognized the potential harm of overstating a defendant's criminal history and thus exposing the defendant to punishment far in excess of what may be necessary to deter recidivism."). Factors to consider in granting a downward departure under Section 4A1.3(b) may include: (1) the remoteness of the prior convictions; (2) the sentencing range that would be imposed if a criminal history enhancement did not apply; and (3) the disparity between the time served on the prior convictions and recommended sentence that would be imposed due to such convictions. *See United States v. Mishoe*, 241 F.3d 214, 220 (2d Cir. 2001) (stating that a large disparity in the sentence for the current offense and times served on prior offenses is indicative of a "deterrent effect so in excess of what is required

in light of the prior sentences"); *United States v. Wheeler*, No. 04-CR-424-15 (RWS), 2004 WL 2646625, at *7 (S.D.N.Y. Nov. 18, 2004) (finding a departure was justified due to the remoteness of two of the three prior offenses, "the significant disparity" between time served on such offenses and the recommended sentence, and the criminal history category that would apply absent the enhancement). Ultimately, a departure is warranted when the Guidelines recommend an "unreasonably harsh" sentencing range that overrepresents the seriousness of the nature of the defendant's prior offenses. *See United States v. Santos*, 406 F. Supp. 2d 320, 328 (S.D.N.Y. 2005) (imposing a three-level downward departure when the defendant's guideline range was enhanced for offenses he committed seven years earlier at age 22).

Mr. Minter's criminal history calculation overstates the nature and obscures the remoteness of his prior convictions. Mr. Minter has three prior offenses that contribute to his criminal history calculation—(1) a 2004 robbery offense, (2) a 2008 robbery offense, and (3) a 2013 drug offense.

Mr. Minter committed the 2004 robbery offense when he was just 19 years' old. (PSR ¶ 37.) He was sentenced to 6 months' imprisonment and 5 years' probation on 8/2/2004, but he was placed on probation the same day of his sentencing, and therefore initially served no prison time. (*Id.* ¶ 39.) Following a "technical violation," Mr. Minter's probation was revoked on 7/17/2006 and he was resentenced to 1-3 years' imprisonment on 7/12/2006. (*Id.* ¶¶ 37-39.) He was then paroled on 2/15/2007. (*Id.* ¶ 40.) In total, Mr. Minter was incarcerated for just seven months for his 2004 robbery offense. Mr. Minter's initial sentence on his 2004 robbery falls outside the applicable time periods provided in U.S.S.G. § 4A1.2(e) for determining whether prior convictions count toward a defendant's criminal history or are otherwise stale. However, due to Mr. Minter's "technical" probation violation and his subsequent resentencing on 7/12/2006, the 2004 robbery offense is counted under the Guidelines and increased his criminal history calculation by 3 points. (PSR ¶ 37.)

Mr. Minter committed the 2008 robbery offense when he was just 22 years' old. (*Id.* ¶ 43.) He was sentenced to 4 years' imprisonment for the offense, but ultimately served a total of just over 2 years. (*See id.* ¶¶ 43-45.) Mr. Minter received 3 criminal history points for the 2008 robbery offense. (*Id.* ¶ 43.)

Mr. Minter's 2004 and 2008 robbery offenses resulted in a significantly enhanced recommended sentence, not only due to the 6 criminal history points attributed to such offenses, but also because these offenses substantially increased Mr. Minter's base offense level. Under U.S.S.G. § 2K2.1(a)(2), Mr. Minter's base offense level is 24 because he committed the instant firearms offense after sustaining "at least two felony convictions of either a crime of violence or a controlled substance offense." Had Mr. Minter not committed a "technical violation" of his probation on the nearly stale 2004 robbery offense, his base offense level would have been 20 under U.S.S.G. § 2K2.1(a)(4). If neither the 2004 nor the 2008 conviction were counted toward Mr. Minter's criminal history, then his base offense level would have been just 14 pursuant to § U.S.S.G. § 2K2.1(a)(6). Ultimately, the robbery convictions that occurred sixteen and twelve years prior to the instant offense resulted in a 10-level increase in Mr. Minter's base offense level

and increased his criminal history category from category III to category V. The significant impact of these remote prior offenses on the applicable criminal history category and offense level reveal that Mr. Minter's criminal history calculation substantially overrepresents the seriousness of his criminal history. *See Wheeler*, 2004 WL 2646625, at *7 n.3 (concluding that where a career offender designation based on remote prior offenses increased the defendant's criminal history category from IV to VI, a departure was warranted).

A departure is further warranted in light of the disparity between the time served on the prior robbery offenses and the sentence that would be imposed due to the impact of such offenses on Mr. Minter's criminal history calculation. *See Mishoe*, 241 F.3d at 220 (finding that "a large disparity" between the punishment prescribed by enhancements and the time served on the prior predicate offenses indicate "a deterrent effect so in excess of what is required in light of the prior sentences and especially the time served on those sentences as to constitute a mitigating circumstance present 'to a degree' not adequately considered by the Commission") (citation omitted). Despite Mr. Minter serving just seven months for the 2004 offense, that conviction alone essentially adds 33-41 months to his range, resulting in a recommended sentence approximately 10-12 times greater than the sentence on the 2004 offense, which further supports imposing a departure. *See id.* (when a defendant served only a few months for a prior offense, a sentence of three years "might be expected to have the requisite deterrent effect").

In light of the remoteness of the robbery offenses, their disparate impact on Mr. Minter's criminal history calculation, and the disparity in time served on those offenses versus the recommended sentence, a departure is warranted as Mr. Minter's criminal history is substantially overstated. *See United States v. Walker*, 595 F.3d 441, 442–43 (2d Cir. 2010) (affirming the trial court's departure from criminal history category V to category IV when the defendant's Guidelines range for a firearms offense was enhanced by two prior robbery convictions, which occurred nine and seventeen years prior to the instant offense). When the defendant's "criminal history determines both the criminal history category and the offense level," courts have discretion to reduce the criminal history category, the offense level, or both. *See United States v. Rivers*, 50 F.3d 1126, 1130 (2d Cir. 1995); *see also Wheeler*, 2004 WL 2646625, at *6 (granting downward departure and reducing both the defendant's criminal history category and his offense level). Even reducing one criminal history level here would result in a more reasonable guideline range of 57-71 months.

Mr. Minter's proposed departure certainly does not go so far as to understate the seriousness of his criminal history as he does not request any further departure based on the remote 2008 robbery conviction, which greatly impacts Mr. Minter's criminal history calculation. The only other criminal conviction contributing to Mr. Minter's criminal history calculation is his 2013 drug offense, which occurred seven years prior to the instant offense. The absence of any more recent criminal offenses by Mr. Minter lends further support for imposing a Section 4A1.3(b)(1) departure.

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III. A SENTENCE OF NO MORE THAN 57 MONTHS IS APPROPRIATE.

Should the Court find that the ACCA does not apply, a sentence of not more than 57 months' imprisonment, consistent with the criminal history discussed above, is sufficient, but not greater than necessary, to achieve the sentencing goals of Section 3553(a).

A. Section 3553(a) Factors

Section 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary,' to accomplish the goals of sentencing." *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (quoting 18 U.S.C. § 3553(a)). To guide courts in applying this principle, Section 3553(a) sets forth a list of factors to consider, including:

i. the nature and circumstances of the offense;

ii. the history and characteristics of the defendant;

iii. the need for the sentence imposed to afford adequate deterrence to criminal conduct and to protect the public from further crimes of the defendant; and

iv. the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

18 U.S.C. §§ 3553(a)(1), (2), (6).

"A district court may not presume that a Guidelines sentence is reasonable; it must instead conduct its own independent review of the sentencing factors . . . ." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008); *see also United States v. Johnson*, 567 F.3d 40, 51 (2d Cir. 2009) (noting that courts must "consider all the § 3553(a) factors and then undertake 'an individualized assessment based on the facts presented") (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)). Courts are "generally free to impose sentences outside the recommended range." *Cavera*, 550 F.3d at 189.

B. Background

Throughout the course of his life, Mr. Minter has always built meaningful relationships with the people around him. Mr. Minter's parents speak to his consistent, caring, and loving demeanor. (*See* Letter of Nadine Allen at 1, a true and correct copy of which is attached as Exhibit K hereto; Letter of Lamorris Minter at 1, a true and correct copy of which is attached as Exhibit L hereto.) His friends – some of whom he has known for 20 years – speak to his thoughtful nature and stellar babysitting skills. (*See* Letter of Julia Fowler, a true and correct copy of which is attached as Exhibit M hereto.) Despite his troubled past, the common thread in Mr. Minter's

character is increasing self-awareness to seek honest work, obtain help, and be more present for his family. The past few years show Mr. Minter's upward trajectory away from crime and towards productivity and responsibility. While Mr. Minter took a step backwards in committing the instant offense, now at 36, he is determined upon release to return to the proper course.

Mr. Minter's uphill battle began younger than most. At 10 months old, he suffered a large dose of lead poisoning evidenced by very high levels of lead found in his blood. (*See* PSR ¶ 70.) The severe effects of childhood lead poisoning on brain development and behavior persist into adulthood, and these effects are well documented.[2] In fact, Mr. Minter's mother attributes certain behavioral issues Mr. Minter later exhibited as resulting from this early setback. (*Id.*)

From a very young age, Mr. Minter was surrounded by criminal activity. His father was in and out of prison and largely absent throughout his childhood. (*See id.* ¶ 66.) At just the age of four, Mr. Minter recalls that his father received a six-year sentence for drug charges. (*Id.*) Upon release, Mr. Minter's father was arrested and returned to prison several more times. (*Id.*) While his father was incarcerated, Mr. Minter's mother remarried and her new husband – Mr. Minter's stepfather – became abusive. (*See id.* ¶ 67.) As a young child, Mr. Minter at least once tried to stop his stepfather from hitting his mother, putting himself in harm's way to shield her, and was ultimately shoved into a table while protecting her. (*See id.*)

Despite a childhood plagued with poverty, abuse, and substantial family obstacles, Mr. Minter's mother described Mr. Minter as a respectful child, who was heavily involved in extra-curricular activities. (*See* Ex. K at 1.) Mr. Minter enrolled in Special Education classes beginning in the 4th grade to overcome his learning obstacles, but also found other ways to express his talents and engage with his community. (PSR ¶ 100.) Whether it was bringing home the golf championship trophy in junior high or performing in the talent show, he sought opportunities to develop his character.

With an incarcerated father and an abusive stepfather, it is unsurprising that Mr. Minter began associating with the wrong crowd and misbehaving in his adolescence. (*See id.* ¶ 68.) Then, at age 16, Mr. Minter dropped out of school to provide for his daughter. (*See id.* ¶ 96.) He worked all kinds of jobs – from sweeping at his mom's work, to cooking in Manhattan, and laying roofs – but with limited financial resources and early exposures to criminal activity due to his father, Mr. Minter turned to illicit activities to earn a living. (*See id.* ¶ 106.) Even into adulthood, Mr. Minter continued to be surrounded by criminal activity as his father and brother were convicted on drug charges in 2013. (*Id.* ¶ 69.)

Although Mr. Minter entered adulthood on poor footing, the last three years reflect a turning point towards progress and growth. Since his release from incarceration in September 2018, Mr. Minter has consistently found honest employment. He secured a job assignment for

[2] *See* Claudia Coulton et al., *Downstream Consequences of Childhood Lead Poisoning: A Longitudinal Study of Cleveland Children from Birth to Early Adulthood*, CASE W. UNIV. CTR. ON URB. POVERTY AND CMTY. DEV. 1, 7-8 (June 2020).

former prisoners through the Center for Employment Opportunities in 2019. (*Id.* ¶ 104.) Following that assignment, Mr. Minter began working as a delivery driver. (*Id.* ¶ 105.) Mr. Minter's release in September 2018 was a seminal point for him to pursue honest work with greater intention. His character largely shifted away from misbehavior and Mr. Minter's vision is set on self-improvement. While Mr. Minter is acutely aware that the instant offense was a grave step backwards, he is determined to return to an honest path.

Mr. Minter's familial ties remain as strong as ever. Throughout his adult life, Mr. Minter has continued to offer a helping hand to his friends when they need him. Whether helping with the family Christmas tree, cracking jokes to his mom, or hosting jam sessions at home, Mr. Minter's commitment to his family and friends has only become more focused since he protected his mother in adolescence. Now, while his mother faces a different battle – one against breast cancer – Mr. Minter continues to stand by her side and offer the support she needs. (*See* PSR ¶ 63.) There is no question as to why Ms. Allen refers to Mr. Minter as her rock. Mr. Minter's friends and family have continued to stand by his side even while incarcerated for the instant offense. (*See id.* ¶ 65.) In the form of supportive phone calls or errand runs, his friends and family – particularly his mom – respond to his needs in the way Mr. Minter has long served theirs. (*See id.*)

Mr. Minter's primary motivation for turning his life around is so that he can be a constant figure in his children's lives, and he makes a concerted effort to stay close to his kids even while incarcerated. (*See id.* ¶ 75.) In one way or another, all of Mr. Minter's kids are living in their formative years. Diavion, age 17, is on the cusp of adulthood as she finishes her last couple of years in high school. (*Id.* ¶ 74.) Dave Jr., age 13, prepares to begin high school as he enters into adolescence. (*Id.* ¶ 73.) Finally, Dav-eyah, age 15 months, was born just a few weeks before Mr. Minter's arrest for the instant offense. (*Id.* ¶ 74.) She is deeply curious about the world around her as she begins taking her steps – albeit with a few stumbles. As a father, Mr. Minter feels an obligation to guide his children through these formative moments and provide guidance that was rarely afforded to him at their ages. (*See id.* ¶ 75.)

For virtually all his life, Mr. Minter's environment has worked against him. Yet, he holds himself accountable for his wrongdoings. Most of all, the past three years have offered the opportunity to seek honest work and find greater fulfillment. For Mr. Minter, this means correcting course and prioritizing his family. With his kids' formative years ahead of them, Mr. Minter hopes to offer the fatherly guidance, support, and presence that was not afforded to him.

A. A Below-Guidelines Sentence Adequately Reflects Mr. Minter's Criminal History.

A sentence of no more than 57 months adequately reflects Mr. Minter's dated and overstated criminal history. The disparate impact of Mr. Minter's criminal history on his sentencing range is discussed at length in Section II. Even if this Court finds that a departure is not warranted, the Court has discretion to impose a below-guidelines sentence for the same reasons

outlined above. *See United States v. Ingram*, 721 F.3d 35, 37 (2d Cir. 2013) (affirming a sentence 44 months below the guidelines range based on the argument that the career offender enhancement overstated the seriousness of the felony crimes that put him in that category).

Such a sentence will provide just punishment for the instant offense, while adequately accounting for Mr. Minter's young age at the time of his prior offenses for which he already served time in prison. While Mr. Minter acknowledges and takes responsibility for his prior convictions, he should not continue to be punished to the degree the guidelines recommend for a technical probation violation that occurred fifteen years ago.

B. The Non-Violent Nature of the Instant Offense Supports a Below-Guidelines Sentence.

During his period of pre-trial detention, Mr. Minter has had time to reflect upon the instant offense. If given the chance to go back, Mr. Minter would never carry a firearm in violation of the law. However, as the PSR notes, there are no identifiable victims to this offense. (PSR ¶ 17.) Additionally, Mr. Minter was not engaged in illicit activity or a crime of violence when arrested. Rather, he was seated in the back seat of a vehicle spending time with friends. (*See* PSR ¶¶ 7-8.) While Mr. Minter deeply regrets his decisions and recognizes that a serious sentence is warranted, he respectfully submits that the Court consider the non-violent circumstances surrounding the instant offense and find that a below-Guidelines sentence provides adequate punishment.

C. Mr. Minter's History and Characteristics Support a Sentence of No More Than 57 Months.

Mr. Minter acknowledges the severity of his offense, but the Court must take into account the circumstances in his life that drove him to criminal activity. Throughout his childhood, Mr. Minter saw his father – a figure that one expects will lead their child away from a criminal path – convicted for crime after crime. Not only was his father incarcerated for most of Mr. Minter's youth, Mr. Minter's abusive stepfather was a poor example of a patriarchal figure Mr. Minter needed so badly in his life.

At school, Mr. Minter struggled through his classes. He was not enrolled in Special Education until the 4th grade, and thus spent several of his formative years in classes that did not meet his needs. After years of struggling through school, Mr. Minter eventually dropped out at the age of 16 to provide for his daughter. Given the difficulties he faced in school, improving his life through education did not seem like an attainable goal at the time to Mr. Minter. Instead, he continually witnessed close family members turn to criminal activities as a means of financial support.

Thus, it is no surprise that during his youth, Mr. Minter made the same mistakes as some of his family members. He recognizes even now that a significant sentence is warranted given the fact that he has violated the law even after serving time for past convictions. Mr. Minter regrets

the decision to carry a firearm in violation of the law and has clearly accepted responsibility for his misconduct by timely pleading guilty. At only 36 years' old, he hopes to be released when he is still young enough to resume the hard work he started three years ago of turning his life around. Spending an inordinate amount of his adult life in prison will only harm Mr. Minter's chances of reintegration and perpetuate the cycle of incarceration he hopes to break out from.

D. A Sentence of No More Than 57 Months Will Provide Adequate Deterrence and Adequately Address the Risk of Future Criminal Conduct.

A sentence of no more than 57 months' imprisonment is sufficient punishment to adequately deter Mr. Minter from further crime because he has significant external motivating factors – primarily his desire to be a stable father for his children and other family members – that will aid in deterring him from further criminal activity. *See Ingram*, 721 F.3d at 37 (affirming a sentence 44 months below the Guidelines range, which was sufficient to address the risk of harm from future criminal conduct).

Mr. Minter is distraught over how his actions have directly affected those close to him. Growing up, he experienced firsthand how criminal activity can adversely affect a family. Mr. Minter watched as his father spent years away from the family, incarcerated for various convictions. He wants to do better by his family and own children.

Even during this past year of pre-trial detention, Mr. Minter has missed both the triumphs and struggles of the family: spending time with his newborn daughter and supporting his mother as she undergoes chemotherapy treatments. Just a few weeks before he was arrested for the instant offense, Mr. Minter welcomed his third child into the world, Dav-eyah Minter. Mr. Minter's detention has caused him to miss some of the most precious moments in Dav-eyah's life: her first words, her first steps, her first laugh. Mr. Minter hopes to be released in time to experience some of Dav-eyah's other firsts, whether it is teaching her to ride a bicycle or taking her to her first school dance. Mr. Minter recognizes that a sentence must be imposed for this offense, but he also realizes, now more than ever, the importance of leading an honest life and being present for his children and mother.

Despite life's hardships, Mr. Minter has had the love and support of his mother through it all. Although she refers to Mr. Minter as her rock, her steadfast example of what it means to be a loving parental figure, in the face of familial and financial difficulty, has been an essential pillar in Mr. Minter's life. Mr. Minter has maintained close ties with his family throughout his detention: he speaks to his mother every day, even as she undergoes chemotherapy.

Being apart from family is extraordinarily difficult in any circumstance. Being apart from his newborn daughter and his ill mother, all in the midst of a global pandemic has made Mr. Minter's detention all the more difficult. But Mr. Minter refuses to allow the instant offense to take him off his course, and he hopes to obtain his high school equivalency diploma while incarcerated in order to expand his future opportunities. Mr. Minter is anxious to return home and

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be present for his family as a father, son, and brother. During his sentence, he hopes to be designated to a facility close to the New York metropolitan area so that his family will be able to visit him frequently.

Given these facts, a sentence of no more than 57 months is sufficient to adequately deter Mr. Minter from committing further crimes, while also giving Mr. Minter hope that he will still have time to build a productive life and support his family.

IV. CONCLUSION

For the foregoing reasons, we respectfully submit that: (1) the ACCA's mandatory minimum does not apply; (2) a downward departure from a criminal history category V to a category IV is appropriate; and (3) a sentence of no more than 57 months' imprisonment is appropriate punishment for Mr. Minter's offense.

Respectfully,

/s/ Derek A. Cohen
Derek A. Cohen

cc: AUSA Kevin B. Mead (via ECF)

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

v. 20 Cr. 24 (JGK)

JAIME BAEZ-MEDINA, SENTENCE

Defendant.

----------x

New York, N.Y.
July 1, 2021
1:04 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

AUDREY STRAUSS
United States Attorney for the
Southern District of New York
REBECCA T. DELL
MICHAEL D. MAIMIN
Assistant United States Attorneys

FEDERAL DEFENDERS OF NEW YORK, INC.
Attorneys for Defendant
AMY GALLICCHIO
ISAAC WHEELER

Also Present:

Jill Hoskins, Interpreter (Spanish)
James Hontoria, Interpreter (Spanish)

(In open court)

(Case called)

THE DEPUTY CLERK: All parties please state who they are for the record.

MS. DELL: Rebecca Dell and Michael Maimin for the government.

MR. MAIMIN: Good afternoon, your Honor.

THE COURT: Good afternoon.

MS. GALLICCHIO: Good afternoon, your Honor.

Federal Defenders by Amy Gallicchio, along with Isaac Wheeler, on behalf of Jaime Baez-Medina.

THE COURT: Okay. Good afternoon, everyone.

I received the presentence report prepared January 22, 2021, revised March 12, 2021, together with the sentencing recommendation and the addendum. I received the defense submission dated March 26, May 28, June 24, 2021. I received the government's submission dated May 14 and June 8.

It's useful at the outset to explain the Court's calculation of the guideline sentencing range in this case. The parties can then make their objection or any arguments. I have carefully reviewed all of the submissions, allowing me to make the guideline sentencing range calculation first, and allowing the parties then to direct their attention to the Section 3553(a) factors.

By the way, since we're wearing masks, if at any time

someone can't hear me, just let me know.

The government contends that the base offense level is 24, as set forth in Section 2K2.1(a)(2) of the current guidelines, because the defendant committed the current offense subsequent to sustaining at least two felony convictions for a controlled substance offense.

The defendant disputes that he had two prior controlled substance offenses, within the meaning of the guidelines. The parties agree that the defendant's 2010 conviction in state court for criminal sale of a controlled substance in the fourth degree, in violation of New York Penal Law, Section 220.34(5), based on a sale of methadone, is a qualifying controlled substance offense; see ECF No. 40 at page 3, note 1.

The parties dispute whether the defendant's convictions in state court in 2004 and 2011, were qualifying controlled substance offenses for purposes of Guideline Section 2K2.1(a)(2).

Having considered all of the lengthy submissions, the court concludes that neither conviction is a qualifying conviction. The defendant was convicted in 2004 of a violation of New York Penal Law, Section 220.34.

The government argues that the defendant's 2004 conviction must have rested on a subsection other than subsections (7) or (8) of New York Penal Law, Section 220.34

and, therefore, should be considered categorically a controlled substance offense.

The parties agree that subsections (7) and (8) cover substances broader than controlled substances under federal law, but the other subsections do not. The categorical approach is used to interpret individual statutes describing only one crime; whereas, the modified categorical approach is used to compare divisible statutes, statutes with different elements in the alternative, creating multiple crimes.

The modified categorical approach is used to determine which elements of the alternatives listed in the statute were necessarily found or admitted as a basis for the matching analysis. New York Penal Law, Section 220.34 is divisible because there are separate crimes listed.

The government argues that pursuant to the modified categorical approach, the defendant's 2004 conviction could not have rested on subsection (7) or (8), and that the remaining subsections are a categorical match to federal controlled substances offenses. Subsections (7) and (8) prohibit substances not controlled by federal law, meaning that if the defendant could have been convicted pursuant to those subsections, the conviction cannot be considered categorically a match for controlled substances offenses under federal law.

Both parties assume that the other subsections of the New York statute are a categorical match to federal law;

therefore, the issue is whether the government can prove that defendant's 2004 conviction could not have rested on subsections (7) or (8) of the New York statute.

Subsections (7) and (8) require that the illicit substances be sold on school grounds, a school bus, or a childcare center. While the defendant's plea allocution did not include any mention of being on school grounds or school bus or at a childcare center, the Court cannot infer the subsection under which the defendant was convicted, because the defendant did not need to plead to all the elements of the offense for which he was convicted.

The defendant was originally charged with a Class B felony, pursuant to New York Penal Law, Section 220.39(1), see ECF No. 47, f1. As part of the plea agreement, the defendant pleaded to a Class C felony, pursuant to New York Penal Law, Section 220.34. However, pursuant to New York state law, when a defendant pleads guilty to a lesser-included offense, as part of a plea bargain, the defendant need not admit the facts charged against the defendant in the indictment or the lesser included offense; *see People v. Griffin*, 160 N.E. 2d 684, 686, (N.Y. 1960).

In fact, because plea bargains in New York can be compromises between the defendant and the state, convictions pursuant to plea bargains may relate to a hypothetical situation without objective basis; *People v. Foster*, 225 N.E.2d

200, 202 (N.Y. 1967) *quoting Griffin,* 166, N.E. 2d at 686. Therefore, when accepting a guilty plea pursuant to a plea bargain, it is unnecessary for a court to establish a factual basis for the particular crime confessed; *People v. Clairborne,* 280 N.E.2d 366, 367 (N.Y. 1972). *See also People v. Falbo,* 105 N.Y. Supp. 3d 721, 723 App Div 2019.

In the case of Mr. Baez's 2004 conviction, the state court did not need to establish a factual basis for the conviction, pursuant to New York Penal Law, Section 220.34, because the plea was entered pursuant to a plea bargain; therefore, the record cannot establish under which subsection of the New York statute the defendant was convicted.

Because the statute as a whole cannot be considered categorically a controlled substance offense, under federal law, the defendant's 2004 conviction cannot be a controlled substance offense, pursuant to Sentencing Guidelines 2K2.1(a)(2). The Court cannot infer that the 2004 conviction must have rested on one subsection rather than another, based on an absence of the facts in a plea allocution, because the defendant did not need to be allocated to the facts of any particular subsection.

The defendant argues that his 2011 conviction, pursuant to New York Penal Law, Section 220.39(1), cannot be considered categorically a controlled substance offense. In particular, the defendant argues that certain cocaine isomers

are controlled by New York law that are not controlled by federal law; and therefore, the New York law is broader than the federal law and is not a categorical match.

New York law controls. "Coca leaves and any salt, compound, derivative or preparation thereof, which is chemically equivalent or identical with any of these substances, including cocaine and ecgonine, their salts, isomers, and salts of isomers, except that the substance shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine." New York Health Law, Section 3306, Schedule 2(b)(4).

The Federal Controlled Substance Act controls. "Coca leaves, 9040, and any salt, compound, derivative or preparation of coca leaves, including cocaine, 9041, and ecgonine, 9180, and their salts, isomers, derivatives, and salts of isomers and derivatives; and any salt, compound, derivative or preparation thereof, which is chemically equivalent or identical with any of these substances," with exceptions not relevant in this case. 21 CFR, Section 1308.12(b)(4).

In this match between the statutes concerns the term "isomer". The New York statute does not specifically define "isomer", but included isomers of cocaine in its list of controlled substances. Whereas, the federal law defines "isomer" to include only known "optical and geometric isomers" of cocaine, 21 CFR, Section 1300.01(b).

By the way, I should have mentioned at the outset, we have an interpreter. Is the interpreter on staff or does the interpreter have his oath on file?

THE INTERPRETER: Yes, your Honor. My oath is on file.

THE COURT: Could you state your name, please, for the record.

THE INTERPRETER: James Hontoria, H-O-N-T-O-R-I-A.

THE COURT: Thank you.

Have you been translating since the beginning of the proceeding?

THE INTERPRETER: Yes, I have.

THE COURT: Thank you very much.

So let me continue.

The government argues that nonoptical and nongeometric isomers of cocaine are not controlled by New York law because they are not chemically equivalent to cocaine. Because the New York statute does not define "chemical equivalent," the government first proposed to define "chemical equivalent" as "having a similar chemical environment, simplified by atoms being attached by similar molecules."

The defendant counters that the government's definition of "chemical equivalence" is too narrow, comparing atoms with a molecule rather than comparing molecules to each other. Under the government's definition of "chemical

equivalence," no isomers of cocaine would be chemically equivalent to cocaine.

In reply, the government argues that the text in the legislative history of the New York statute indicate that the inclusion of the, "isomers" in the statute was designed to capture solely the dextrose isomer of cocaine, which is also controlled by federal law. However, the government's textual argument misreads the New York statute. The New York statute under a plain reading suggests that "cocaine and ecgonine, their salt, isomers and salt isomers" can be chemically equivalent to "coca leaves" or any "salt, compound, derivative or preparations thereof" and are controlled by New York state law.

Put differently "isomers" are specifically included in the subset of molecules that can be chemically equivalent or identical with coca leaves or any salt, compound, derivative or preparation thereof. That is the definition that the New York State Legislature has given us. The New York state statute controls cocaine and all isomers of cocaine; while the federal statute controls only the optical and geometric isomers of cocaine.

The legislative history also counsels against the government's interpretation of the statute. The government argues that the inclusion of the term "isomers" in the New York statute was designed to counter the isomer defense, which

posited that the dextro isomer of cocaine, before the inclusion of isomers in the statute, was not prohibited by state or federal law. However, the sponsor's memorandum of the bill that amended the statute to prohibit isomers of cocaine stated that the problem of the dextro isomer defense "could be resolved by enacting this amendment, which would include all isomers of cocaine." The sponsor's memo, Bill Jacket Law 1978, Chapter 100, New York, Defense Exhibit D.

This legislative history belies the government's contention that the statute was designed to prohibit just the dextro isomer of cocaine, because it made clear that the chosen solution of the New York State Legislature to deal with the dextro isomer offense was to prohibit all isomers or to control all isomers of cocaine. Whether wise or not or overbroad or not, the provisions of the New York state law should be understood as drafted until amended. The federal law pursued the narrower path of prohibiting geometric and optical isomers.

Accordingly, under a plain reading of the New York statute, and when considering the legislative history and intent of the provision, the New York statute controlled all isomers of cocaine, while federal law only controls geometric and optical isomers of cocaine. *See United States v. Fernandez Tavares*, 2021 WL 66485 *5 (E.D.N.Y. January 7, 2021). "As a result of the difference in the definitions of cocaine under New York law and federal law, possession of certain cocaine

isomers is illegal under the New York statute, but legal under the Controlled Substance Act."

Therefore, the 2011 conviction cannot be considered a controlled substance offense pursuant to Sentencing Guideline Section 2K2.1(a)(2). It is unnecessary to reach the defense argument that the 2011 New York state conviction is also not a categorical match for the federal controlled substance offense because the New York statute included naloxegol as a controlled substance.

While the Federal Controlled Substance Act excludes naloxegol today and the Court should compare the scope of the New York statute at the time of conviction with the scope of the federal statute today, that is a question that is pending for decision before the Court of Appeals for the Second Circuit. See *United States v. Gibson* 20-3049, and has divided district courts and other courts of appeals.

It is unnecessary to answer that question in this case because the broader inclusion of isomers of cocaine render the New York statute broader than its federal counterpart at the time of the defendant's 2011 conviction and today. Therefore, the proper offense level is 20 under Section 2K2.1(a)(4), because the defendant indisputably committed the instant offense or the current offense subsequent to sustaining one felony conviction for a controlled substance offense, not two. The 2010 conviction is indisputably one controlled substance

offense.

The probation department recommended a two level enhancement under Section 2K2.1(b)(4), because the firearm was stolen. The defendant objects to this enhancement because the enhancement was not based on empirical evidence and increases the guideline without a sound basis. The Court can certainly take into account that a guideline is not well-founded, but there certainly is an understandable effort in the guidelines to discourage the possession of a stolen firearm. That is certainly a justification for the enhancement.

In any event, there is no question that the guideline applies in this case, because there is no dispute that the firearm was stolen. There is no dispute that the defendant possessed a stolen firearm; therefore, the two-level enhancement is appropriate under Section 2K2.1(b)(4). Therefore, the total offense level is 22; 20 under Section 2K2.1(a)(4)(a), and 2 under Section 2K2.1(b)(4). The defendant is entitled to a three-level reduction under Section 3E1.1 for acceptance of responsibility.

The total offense level is, therefore, 19; the Criminal History Category is VI; and the guideline sentencing range is 63 to 78 months.

All right. I will now call on each of the parties, as I always do: Defense counsel, the defendant, and the government, asking if there are any objections to the

presentence report and then for any statements that the parties would like to make. You are welcome to make any discussion or objections to what I've already said, in addition to any objections that you may want to lodge with respect to the presentence report.

As you know, I always ask those two questions because if there are objections to the presentence report, I have to either resolve them or determine that they don't affect the sentence, so it's important for me to ask that question. And it's also important for me to ask the second question, which is, I'll listen to each of the parties for anything they wish to tell me in connection with sentence. And so, as I said, you can give me any objections to the presentence report, as well as any objections to what I already said.

So Ms. Gallicchio, have you reviewed the presentence report, the recommendation, and the addendum? Have they been translated for the defendant? And have you discussed them with the defendant?

MS. GALLICCHIO: Yes.

Good afternoon, your Honor.

I have read the presentence report and the addendum. Mr. Baez does speak English very well, your Honor, but is more comfortable in today's proceeding with an interpreter. While I did not translate the document, I did speak with him at great length about it and was confident that he understood it.

THE COURT: Thank you.

MS. GALLICCHIO: I have no further objections. The objections that we raised in the presentence report noted on page 31 have already been addressed by the Court.

Beyond that, I have no further objections.

THE COURT: All right.

I'll listen to you for anything that you would like to tell me in connection with sentence, any statement you'd like to make, anything at all you'd like to tell me.

MS. GALLICCHIO: Yes. Thank you, your Honor.

At this point, your Honor, Mr. Baez has now been in prison, in jail, in custody, for a total of 22 months from the moment he was first arrested by NYPD for the possession of this gun, which was on August 24, 2019. As I've indicated in my submission, your Honor, none of this time can be credited to this federal sentence that the Court will impose today; and that is because he is in primary state jurisdiction.

He was arrested by federal authorities on January the 6th, 2020, at Riker's Island, and then transferred into BOP custody. But at that time, a detainer was already lodged against him for the pending Bronx matter for which he is pending sentencing. And so while all of the state firearm offenses were dismissed when he was arrested on federal charges, he was also in custody, remanded on that Bronx matter that I outlined in my papers.

THE COURT: Just so that I'm clear, I understand the statement that the defendant will not receive credit towards his federal sentence until the day that he's sentenced, today, because he has primary jurisdiction in the state court. His time in detention will be credited to the state court offense for which he faces a five-year sentence, which the state court judge has indicated the state court judge will run concurrently with the federal sentence.

MS. GALLICCHIO: Yes, that's correct, your Honor.

THE COURT: Again, so that I'm clear, the 22 months that the defendant has spent in state custody will come from his five years on the state court conviction, so that the defendant has about two and-a-half years left on his state court conviction, correct?

MS. GALLICCHIO: I think he would have a little more than that. He would have approximately 40 months. He's expecting a sentence of 60 months, five years on that. Subtracting 21 months from that would be approximately 40 months. I'm assuming in the state court there will be some time or time credited, so it's likely he wouldn't serve the entire 40 months, but that would be the remainder on that sentence.

THE COURT: Will the defendant spend the remainder of his sentence in state custody or in federal custody, when the state court judge says he wants the state sentence to run

concurrently with the federal sentence? I would have thought that there's some thought out there that some defendants would prefer to be in federal rather than in state custody.

MS. GALLICCHIO: Yes. I don't know the answer to that question, actually. My instinct tells me that he will be in state custody because that is the primary jurisdiction. I don't know whether there's a mechanism by which to change that.

THE COURT: Okay.

MS. GALLICCHIO: Your Honor, as we've asked, we have asked for a sentence of time served. But understanding that that may not be what the Court is contemplating, we're asking the Court that whatever sentence the Court imposes, that the Court run it concurrent to the sentence that is yet to be imposed in state court; and that is because it is our position that a total sentence of five years is sufficient to serve the interests of 3553(a) and the rules of sentencing.

And I've also outlined the reasons for that in my sentence submission, and I'll briefly outline the mitigating reasons now why I think that's appropriate in this case.

First, your Honor, I want to talk about something the Court has heard many times, of course, which are the conditions of confinement that Mr. Baez has suffered in the last 22 months and, in particular, since he was transferred into federal custody in January and when the pandemic began. And even before then, your Honor, as I outlined in our papers --

THE COURT: Can I stop you, Ms. Gallicchio.

We actually have two interpreters, I see. Could the second interpreter please indicate your appearance on the record and tell me whether your oath is on file.

THE INTERPRETER: Jill Hoskins, staff interpreter, oath on file.

THE COURT: Okay. And between you and the other interpreter, have the proceedings been continually translated from the outset?

THE INTERPRETER: Yes, they have, your Honor.

THE COURT: Thank you.

Go ahead, Ms. Gallicchio.

MS. GALLICCHIO: Your Honor, the last 22 months have been brutal for Mr. Baez, and certainly since February of last year right at the beginning of the pandemic. He suffered through a lockdown related to a rumor that there was -- and ultimately found -- a firearm inside the MCC, a terrifying and unbelievable event that created great trauma for not only Mr. Baez, but many other people. The firearm itself was actually found in Mr. Baez's unit; so, again, added a fear level of later realizing the danger that he was in. He has been incarcerated for the life of the pandemic, so he has seen it all and experienced it all. And not only that, your Honor, he has been incarcerated in one of the toughest and harshest federal detention facilities in the country, infamously so.

I know the Court is well aware of the suffering of inmates at the MCC. And again, a terrifying experience, and one that is a real, live experience for Mr. Baez. And obviously, we cannot underestimate the severity of the experience, no matter how many times we hear these stories.

During one phone call, your Honor, I had with Mr. Baez, I told him to stay positive. And he responded to me, Ms. Gallicchio, I'm trying, but it's hard to stay positive in here. It has been traumatizing, dehumanizing, and demoralizing. I don't think I can stress that enough.

And the question is -- and I know the Court has considered this question -- what is that worth? Does it warrant a sentence reduction beyond what the Court would normally sentence? I submit to the Court that it does deserve a significant sentence reduction, and indeed that has been the trend in this district. And of course, beyond the pandemic, as I've already said, your Honor, the totality of the brutal conditions on a good day at MCC, they are, for all intents and purposes, deplorable and intolerable, as has been called out by judges in this courthouse over and over again.

And so, your Honor, I submit to the Court, based on those factors, Mr. Baez has experienced a level of punishment by far disproportionate to the crime.

Second, your Honor, I ask the Court to look at the personal history and characteristics of Mr. Baez. He is a man

who is well aware, who has struggled for all of his adult life with his debilitating drug addiction. It has resulted in countless arrests; 57 misdemeanor convictions, four felony convictions, all enmeshed with his addiction. It has cycled him in and out of jail, in and out of his life, and in and out of rehab facilities.

Your Honor, I think what's important about those arrests is that there's no history of violence. These arrests are clearly as a result of -- motivated by his drug addiction. It's affected other parts of his life as well. It's affected his health. It's in the motion papers. It has affected his relationship with his family, who worries about him endlessly.

THE COURT: One of the unusual aspects of the history is an argument in favor of a sentence that the defense seeks, is that the defendant's family cares for him and will take care of him when released, provide him with a job. And I ask myself, Where has the family been for years and years and years through 60 convictions? And then I ask myself, How realistic or credible is it that now, after all of these years, the family says they've always cared, they've always been there, and of course, the defendant will have a job and they will take care of the defendant.

MS. GALLICCHIO: Your Honor, perhaps I should have been clearer maybe in my papers, but I will say that the family has been there. The problem has been that Mr. Medina has not

let them help him. He has not reached out for help. His mother and father are in Puerto Rico, and they're elderly. When they were younger, they tried to reach out; they tried to offer him help. And like so many people struggling with addiction, he wasn't ready for it. His brother, who is a hardworking guy, lives in Florida, who I've been in touch with on many occasions, has done the same thing. But to some degree, as his brother pointed out, Mr. Baez was like a lone wolf floundering in New York City. And at times, they didn't even know where he was because his drug addiction took over his life so much.

And so it is a good question; but from what I know from this family, I know that they've been there and they tried. And sometimes family can only do so much until their loved one gets ready to accept the love and the care that they are offering. And for a long time, Mr. Baez was not ready, clearly, for decades probably. But this experience, where he is now in his life, his age, the depths that he's reached in his addiction, he's ready. He can't go anywhere else. There's nothing further below that he can get to. He's reached rock bottom at this point, and this really is his last chance, regardless of whatever sentence the Court imposes.

At 48 years old, your Honor, he can't continue this lifestyle or he's not going to survive. And so, look, we have to have faith and hope for the best. Obviously, we can't

predict the future, but I know from my interactions with Mr. Baez, the sincerity of his convictions now, I think it has been as a result of his incarceratory experience that has really shaken his soul.

And so in answer to the Court's question, they are there to the extent that they have tried, and tried like many parents who have loved ones struggling with addiction. And I'm hopeful, based on my interactions with Mr. Baez and his expression of commitment and remorse and desire to change, that he can do it with, of course, the support of his family.

THE COURT: The defendant has been in custody for 22 months. How has the defendant done with respect to remaining drug-free while in custody? Any disciplinary proceedings with respect to possession of drugs?

MS. GALLICCHIO: No, your Honor. He's done well, despite -- as the Court knows, despite the presence, certainly, of drugs at the facility.

THE COURT: The defendant has been on methadone --

MS. GALLICCHIO: Yes.

THE COURT: -- in prison?

MS. GALLICCHIO: That's correct. And that certainly has helped. And he needs it, unless and until he can detox from methadone at some point in his life, your Honor.

I think where we're at then is what is the need for the sentence, of course. I submit to the Court he has

certainly been punished harshly and severely already. As I've already said, he's been deterred by this punishment and he's motivated to change. But what he needs is treatment. What he needs is help. He has not gotten -- other than methadone, methadone maintenance and medication, he's not had the intensive treatment therapy that he needs to overcome his addiction, largely because the prisons have been locked down for so long and programs have ceased. Hopefully that will change, but I don't know what the future will hold with respect to that. But as I suggested to the Court, the best treatment he can get is in the community, in a residential program, with his family to support him.

So, your Honor, I would submit to the Court that a sentence certainly in the range as the Court has found, even though, of course, it's lower than what probation has recommended and the government believes is appropriate, is still excessive and harsh based on all the mitigating circumstances I just laid out. And so our request is the same, that the Court consider a sentence of time served, or whatever sentence the Court imposes to run concurrent to the five-year sentence he is expected to receive on July the 8th, actually, next week, your Honor.

Thank you.

THE COURT: Okay.

Thank you, Ms. Gallicchio.

Mr. Baez-Medina, have you reviewed the presentence report, the recommendation and the addendum, and discussed them with your lawyer?

THE DEFENDANT: (In English) Yes, I do, your Honor.

THE COURT: By the way, you're welcome to respond to me in English, if you prefer or in Spanish and have the interpreter interpret. Whatever you feel comfortable with.

THE DEFENDANT: (In English) I feel comfortable to respond in English, sir.

THE COURT: Okay.

Do you have any objection to the presentence report, the recommendation and the addendum, other than what your lawyer has already said and I've already dealt with?

THE DEFENDANT: (In English) No, your Honor.

THE COURT: I'll listen to you for anything that you would like to tell me in connection with any sentence, any statement you would like to make, anything at all you would like to tell me.

THE DEFENDANT: (In English) First and foremost, good afternoon to everybody.

Your Honor, its been hard, not only this two years. I've been in this addiction almost all my life. I need help. You the only one who can give me the help that I need. I got my family in my corner right now.

You just mention, where is the family all this time?

Thank you for mentioning it. Now I got it. Now it's in my corner. I see my team. I got it, your Honor. My family is in my corner and will help me.

I would like you to give me the sentence, whatever you give me, just please run it together and send me to a program or a treatment residential program and I can do it. I can do better than jail. I would like to get a program, a residential program. I going to 48 years old and I don't got nothing.

The only thing I got is my family, and they willing to help me. I know I did wrong. And you can see, I never got gun problem in my life. The only thing I got is drug problems. Please, I begging you, your Honor, give me anything you can give me to run it together. I got my family. I just need one more chance. Thank you.

THE COURT: All right.

Thank you, Mr. Baez-Medina.

Has the government reviewed the presentence report, the recommendation, and the addendum?

MS. DELL: Yes, your Honor.

THE COURT: Does the government have any objections?

You're welcome to raise any objections you have.

MS. DELL: We just object to the Court's finding that the 2004 and 2011 convictions cannot be considered controlled substance offenses. Other than that, we rely on our papers. Aside from that, we do not have any objections.

THE COURT: Okay.

I'll listen to you for anything you'd like to tell me in connection with sentence.

MS. DELL: I believe your Honor had one question which my colleague Mr. Maimin can speak on.

MR. MAIMIN: Your Honor, I just have the advantage of many years. Your Honor asked Ms. Gallicchio about where Mr. Baez-Medina will serve his sentence while there is still a running state sentence that's concurrent to a federal sentence, assuming that they run concurrently.

The answer is that while technically it's entirely up to the Bureau of Prisons and the New York State Department of Corrections to work it out, in my dealings with the Bureau of Prisons on this very issue over and over, their policy is that whoever has primary custody maintains actual custody during any joint custodial sentence until the termination of that sentence.

So if, to use easy numbers, Mr. Baez-Medina had one more year on a state sentence, and your Honor sentenced him to three years, he would serve the next year in the state, and then be transferred to the federal government.

Your Honor also asked if there's any way around that. And the answer is, I can think of ways to get around it; namely, to transfer primary jurisdiction by the state, choosing to bail Mr. Baez-Medina, wait for him to be picked up by the

feds on a detainer, and then to revoke bail, that way they transferred primary custody.

However, in my experience, that's not going to happen. So the answer is -- my understanding of the policy is that Mr. Baez-Medina will serve the rest of his state sentence in state custody, even if there is a running federal sentence at that time, and then be transferred to federal custody for any remainder sentence that this Court has imposed.

THE COURT: As I said to Ms. Gallicchio, my impression is that defendants often would prefer to be in federal custody because of the ability of some programs available in the federal system that are not available in the state system. But I don't know, from what both parties have told me, there's nothing that I can do to accomplish that.

MR. MAIMIN: That's right, your Honor.

Also, I just wanted to raise one other purely technical matter regarding your Honor's ruling before I leave it to Ms. Dell, which -- and obviously, we disagree with your Honor's ruling, but it was a thoughtful ruling; but there was one specific issue that I just want to make sure that we were on the same page, at least about what our argument is.

THE COURT: Sure.

MR. MAIMIN: And that's the grammatical argument dealing with New York Public Health Law, Section 3306. Your Honor seems to recognize that that's an extremely important

part of the discussion and determination. And as I understood the Court, the Court's idea was -- because it says, including cocaine and its isomers, to abbreviate, that that was how the state law was defining "chemical equivalence".

And the reason that I take issue with that is both historical and grammatical. Historically, the statutes before the legendary 3306, refer to chemical equivalence. And, in fact, that was part of the issue in the isomer, that it's not a chemical equivalent. It wasn't undefined, although it's not terribly defined, the term being defined for the first time by this statute. But more importantly, there's the fact that this led to an odd grammatical reading.

And if I may give a counterexample or hypothetical. The Court and I may disagree all day long about whether a BMW motorcycle is what we would consider, "a high performance motorcycle". However, if a motorcycle dealership advertises. We have all of the high-performance motorcycles you need, including BMW, and all of its varieties, nobody would say that that motorcycle shop is thereby defining "motorcycle" to include BMW, sedan, coups and SUVs. Rather usually, when you say something includes something else, the latter is a subset of the former.

And there may be something that conforms it here; that is, that tells the courts, hey, where there's a real issue with what is or is not chemically equivalent, this may help to

inform, we think, at least some isomers are chemically equivalent. I think it's grammatically odd to say that the subset defines the set, rather than the other way around.

I suspect your Honor disagrees, from your Honor's opinion; just wanted to make sure we were on the same page about what our argument was.

THE COURT: I do understand your argument. And you're right, I disagree. I think I have to read the statute as the legislature has left it to me. And it may not be the most artfully drafted statute, but there it is. And the most natural reading is the reading that I gave it, which is certainly supported by the legislative history as to the broad inclusion of isomers.

So perhaps the New York State Legislature was not sufficiently careful in their drafting, but I have to deal with the statute as it is. And with so much of what's been argued out in the papers, both with respect to isomers and naloxegol, all of this is fixable by the parties who should be fixing it. So the New York State Legislature -- if the arguments are that New York State Legislature has really controlled more than it really intended.

And with respect to naloxegol, if the Sentencing Commission were simply sufficiently staffed so that it could make a decision with one amendment to the guidelines, it could resolve the issue of naloxegol. And it is truly unfortunate

that the parties have to spend as much time and effort in drafting these issues, which don't really go to the central issues that the Court ultimately has to decide under the 3553(a) factors. And yet, for example, in this case, it was only the initial briefs that touched on the 3553(a) factors, and then we went off to five additional briefs on naloxegol and isomers, which is not the way in which sentences really should be determined.

And by the way, if there's no solution from the Sentencing Commission -- and I have no idea what the prospects are for a fully constituted sentencing conviction -- the Second Circuit wouldn't decide this issue completely, perhaps; because the government has made it clear in its papers that while the issue of do you look at the sentencing guidelines at the time of conviction or at the time of sentence, it reserves the question of whether naloxegol is, in fact, controlled under state law; and it reserves that to another day.

So if the defense wins on *Gibson*, the government would fight out whether naloxegol is really controlled under state law in subsequent cases, so it will be another year until there's finally an answer.

MR. MAIMIN: I understand. I share your frustration, especially regarding the commission, where, as we know, some of the issues present -- not all of them, but some -- there was a proposed amendment to resolve some of the issues that did not

get through before the commission lost its quorum so many years ago. It was in 2016, I think, or 2017. Of course, the problem with the idea of New York state fixing the statute is they have a very different incentive because they aren't in front of your Honor.

As I think we've pointed out, their course of conduct shows that they don't think there is something to be fixed, because they don't treat naloxegol as a controlled substance. They don't treat scopolamine, which is a generic isomer for pain, which has 17 carbon atoms, 21 hydrogen atoms, one hydrogen and four oxygen, as a controlled substance.

THE COURT: Okay. Please.

The New York State Legislature is not deaf. There is an issue that is directly affected by New York state law. Plainly that's an issue that can be presented to the New York State Legislature. And even though it may not affect prosecution in the New York state courts, that doesn't mean that the New York State Legislature would fail to listen to what the effect of the New York state statute is on prosecutions in federal court. We have a federal system and these are legislators who look at issues and make decisions, so they made a decision with respect to isomers.

If that decision has untoward results that the New York State Legislature did not think are appropriate, the New York State Legislature can fix the New York state statute. And

by your argument, it doesn't affect the New York state prosecution because New York state isn't prosecuting these other isomers anyway. So there have been, if memory serves me right, other fixes to the New York state statutes in order to make them consonant with the federal statute, so I leave it at that.

MR. MAIMIN: The last one that I recall, at least regarding the narcotic statutes, was in, I want to say, 1987 or '88. Sadly, I think your Honor is a bit more optimistic than I am on what the legislative intent is. But as your Honor says, we work with the statutes we're given, not the ones we wish we had. I just respectfully disagree with your interpreting the ones that we were given.

Just finally, in case your Honor was hoping for guidance from the Second Circuit, I think it's just worth pointing out that *Gibson* won't necessarily resolve everything because it's on plain error. In fact, I don't know of any Second Circuit cases currently pending on any of these issues that are not on plain error. So even if they find there's not plain error, that doesn't necessarily resolve the underlying question.

I do know that the government has started to take the official position in briefs submitted to the Second Circuit, including one submitted a week or two ago on the cocaine isomer naloxegol issues as well. But, again, those are only on the

plain-error standard.

THE COURT: What's the position that the government is taking?

MR. MAIMIN: The same one that we took here. I think that your Honor read those briefs, you would find it awfully familiar.

THE COURT: As I read the briefs before me on this sentencing issue, they read like briefs submitted to another court. They read like briefs submitted to a Court of Appeals. I don't usually get briefs written, just in terms of style, in the way that some of the briefs were written, so I suspect that they came from briefs submitted to another court. So I checked the briefs in *Gibson*, they were not the briefs in Gibson. I think I checked *Lucas*, and they didn't seem like the briefs submitted in Lucas either.

MR. MAIMIN: I can tell you the genesis.

A, they will seem a lot more similar to -- and I'm trying to get the name of it, to the other district's brief -- Hadaya Johnson. And I think you will find that they are a lot more similar. The briefs in front of your Honor were actually written before the Hadaya Johnson briefs, but I certainly -- when we were preparing the argument, we saw where this was likely to end up one day.

THE COURT: Okay.

MR. MAIMIN: I hope your Honor wasn't offended by our

more appellate-style brief.

THE COURT: Okay.

MS. DELL: Just briefly, your Honor.

Your Honor mentioned 3553(a) factors, and I'd like to just bring us back to those for a brief moment. They were mentioned in our opening briefs, but just to remind the Court that the government believes that a significant sentence is necessary here in order to promote respect for the law and for the general and specific deterrence.

The defense noted herself, the defendant has over 60 prior convictions, and none of those prior conviction deterred the defendant from continuing to commit crimes, nor to commit the serious crime in this case. Instead, this shows a pattern of a consistent disregard for the law, and the government believes that the defendant knew what he was doing was wrong.

As the facts in this case show, when the defendant had the firearm in this case and observed police officers, he put the firearm behind a van, likely because he knew he was not supposed to hold it. These prior convictions did not deter him from committing this offense.

And the government also believes that a significant sentence is necessary here because of the seriousness of this offense. While the firearm was not used in this case, again the firearm was just left on the ground. And had the police not recovered it quickly, it's possible someone could have

picked it up and used it.

In addition, the defendant was holding the firearm in some way that prompted someone to call 911 and alert the police. Had someone with nefarious intent seen the defendant with a firearm, there could have been a violent incident at night in the Bronx.

For those reasons, the government believes a significant sentence is warranted.

THE COURT: Thank you.

I'll place the presentence report, the recommendation and addendum in the record under seal. I'll place the parties submissions to me also in the record under seal. The parties should place their own submission in the record not under seal after redacting any personal-identifying information.

I adopt the findings of fact in the presentence report, except as I've already indicated. Therefore, as I've already indicated, I conclude that under the current guidelines, the total offense level is 19. The Criminal History Category is VI, and the guideline sentencing range is 63 to 78 months.

I appreciate that the guidelines are only advisory, and that the Court must consider the various sentencing factors in 18 U.S.C., Section 3553(a), and impose a sentence that is sufficient, but no greater than necessary, to comply with the purposes set forth in Section 3553(a)(2).

The offense is serious, the possession of a firearm by a convicted felon. Moreover, the defendant has a substantial criminal history. The defendant is in Criminal History Category VI, the highest criminal history category. He has sustained over 60 criminal convictions. While most of the criminal convictions were for misdemeanors, the defendant also had several felony convictions for various controlled substance offenses. Prior sentences have not deterred the defendant.

There are mitigating circumstances. The Court appreciates the defendant's history of addiction and mental health problems, but the defendant has thus far been unable to conform his conduct to the law, even when given a chance by the state court. The Court appreciates that the defendant's addiction and mental health problems are mitigating circumstances.

In addition, the defendant's confinement has been particularly harsh because of the COVID restrictions that the defendant has lived under. The probation department concludes that the defendant's difficult history warrants consideration and suggests only a slight variance; but the probation 's calculation of the guidelines, which is much higher than that calculated by the Court, is appropriate.

In attempting to balance these variant factors, the Court concludes that a substantial sentence is necessary for purposes of deterrence and protection of the public. On the

other hand, the Court must take into consideration the mitigating circumstances.

The Court also appreciates that the defendant has thus far, for almost two years, been able to control his conduct while in custody on a methadone maintenance program. It is also significant to the Court in determining the defendant's sentence to take into account the total sentence that will be served by the defendant since the defendant first came into custody of the state authorities. An incremental sentence is necessary, but the Court should take into account the total time that the defendant will have spent in custody.

The Court also takes into account the beneficial effects of a substantial period of supervised release. The defendant will receive treatment during supervised release, and any violation of supervised release will come before the Court.

So taking into account all these factors on balance in this case, the Court intends to impose a sentence of 48 months on Count One, to be followed by a three-year term of supervised release, with the standard conditions of supervised release in this district and those recommended by the probation department.

The Court will provide that the sentence is to run concurrently with the undischarged term of the defendant's state court conviction. The Court recommends that the defendant be admitted in the intensive residential substance

abuse treatment program of the Bureau of Prisons.

The Court will not impose a fine because the defendant lacks the ability to pay a fine, after taking into account the presentence report. The Court will not impose restitution because there is no victim under 18 U.S.C., Section 3263. The Court will impose a $100 special assessment.

The sentence is consistent with the factors in Section 3553(a); and it's sufficient, but no greater than necessary, to comply with the purposes of Section 3553(a)(2).

I've already explained the reasons for the sentence. Before I actually impose the sentence, I'll recognize defense counsel for anything defense counsel wants to tell me.

MS. GALLICCHIO: Your Honor, there's nothing else that I wish to add at this point. Thank you.

THE COURT: Before I actually impose the sentence, Mr. Baez-Medina, I'll recognize you for anything that you wish to tell me, anything you'd like to say, anything at all you'd like to tell me.

THE DEFENDANT: (In English) Your Honor, thank you. Thank you.

You give me my life back now. Now I just got -- I can't forget this time. Its gonna be two years in this pandemic situation, this bring -- really open my eyes. Thank you, Judge Koeltl. I don't know if I'm saying it correct. Thank you for your help. Thank you. Thank you for help me and

thank you for help others I'm 47 years old. I suppose to be in my house trying to pick something to my kids, not here, you know.

Thank you. Thank you for everything.

THE COURT: Mr. Baez, thank you.

A couple of other comments, Mr. Baez-Medina.

I know from your submissions that you were thinking about the possibility of a job with your family down south. It could be that if that comes to pass, supervised release will be supervised by a judge in another jurisdiction. If you're supervised in this jurisdiction, any violation of supervised release comes to me. And I have a very good memory. And if you violated the terms of supervised release for whatever reason, you'd be back before me. Please don't let that happen.

The probation department does a very good job of supervising people, of making programs available to them. It's in their interest to look out after people that they supervise. So work with them. Assure yourself that you're never back here. Do you understand what I've said?

THE DEFENDANT: (In English) I understand.

THE COURT: All right.

I'll recognize the government for anything the government wishes to tell me.

MS. DELL: Nothing further.

THE COURT: All right. Let me make one final comment

before I actually impose the sentence, just to finish the discussion that I had with the government.

The other solution that is out there and which is open to the government to pursue is to urge a different understanding of the categorical approach. That's a change that district courts can't make questionable, whether the Court of Appeals can make that change. But it is certainly odd that important decisions in the sentencing process depend upon such things as where does naloxegol and isomers of cocaine stand. So one would think that both the government and institutional defense organizations should think about that and think about to whom such arguments could possibly be made.

All right. Pursuant to the Sentencing Reform Act of 1984, it is the judgement of this Court that the defendant, Jaime Baez-Medina, is hereby committed to the custody of the Bureau of Prisons, to be imprisoned for a term of 48 months on Count One. The sentence is to run concurrently with the undischarged term of the defendant's state court conviction.

I recommend that the defendant be admitted to the intensive residential substance abuse program of the Bureau of Prisons.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the

probation office in the district to which the defendant is released. While on supervised released, the defendant shall comply with the standard conditions of supervised release in this district.

The defendant shall not commit another federal, state or local crime. The defendant shall not possess a firearm or destructive device as defined in 18 U.S.C., Section 921. The defendant shall refrain from any unlawful use or possession of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment, and at least two periodic drug tests thereafter, as directed by the probation officer. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant will participate in an outpatient treatment program approved by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

The defendant must contribute to the cost of services rendered based on his ability to pay and the availability of third-party payments.

The Court authorizes the release of available drug treatment evaluations and reports, including the presentence investigation report, to the substance abuse treatment provider. The defendant must participate in an outpatient mental health program approved by the United States probation

office. The defendant must continue to take any prescribed medications unless otherwise instructed by the healthcare provider. The defendant must contribute to the cost of services rendered based on his ability to pay and the availability of third-party payments.

The court authorizes the release of available psychological and psychiatric evaluation and reports, including the presentence investigation report, to the healthcare provider.

The defendant shall submit his person and any property, residence, vehicle, papers, computer, other electronic communication, data storage devices, cloud storage or media internet to a search by any United States Probation Officer and, if needed, with the assistance of any law enforcement. The search is to be conducted when there is reasonable suspicion concerning violation of a condition of supervision or unlawful conduct by the person being supervised. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to search pursuant to this condition. Any search shall be conducted at a reasonable time and in a reasonable manner.

It is further ordered that the defendant shall pay to the United States a special assessment of $100, which shall be due immediately.

I've already explained the reasons for the sentence. Does either counsel know of any legal reason why the sentence should not be imposed as I've so stated it?

MS. DELL: Not from the government.

MS. GALLICCHIO: No, your Honor.

THE COURT: All right. I'll order the sentence to be imposed as I've so stated it.

There's no waiver of the right to appeal, correct.

MS. DELL: Correct.

THE COURT: Okay. Mr. Baez-Medina, you have the right to appeal the sentence. The notice of appeal must be filed within 14 days after the entry of the judgment of conviction, so you should discuss this issue promptly with your lawyer. If you cannot pay the cost of appeal, you have the right to apply for leave to appeal *in forma pauperis*. If you request, the clerk will prepare and file a notice of appeal on your behalf immediately.

Do you understand?

THE DEFENDANT: Yes, I understand, your Honor.

THE COURT: As a matter of prudence, will the government move to dismiss all open counts?

MS. DELL: This is the only count.

THE COURT: Yes. As a matter of prudence, will the government move to dismiss any open counts?

MS. DELL: Yes.

THE COURT: The reason that I say that is every now and then -- and this is probably not a case -- there is, for example, a plea to a lesser-included offense. And if there's no motion to dismiss any open counts, it ends up coming back to me. So as a matter of prudence, I usually ask the government to dismiss any open counts. It can't be harmful if no one thinks there is any open count. And it can only be helpful.

So the government moves to dismiss any open counts and the defense agrees, right?

MS. GALLICCHIO: Yes.

THE COURT: All open counts are dismissed on the motion of the government.

All right. Anything further?

MS. GALLICCHIO: No, your Honor.

MS. DELL: No, your Honor.

THE COURT: Thank you.

(Adjourned)

Exhibit B

U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

TH:JPM
F.# 2019R00582

November 30, 2020

By ECF and E-Mail

The Honorable Frederic Block
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. James Devane
Criminal Docket No. 19-244 (FB)

Dear Judge Block:

The government respectfully submits this letter in advance of the defendant James Devane's sentencing proceeding, which is scheduled for December 2, 2020. For the reasons set forth below, the government respectfully requests that the Court impose a sentence within the advisory United States Sentencing Guidelines ("Guidelines" or "U.S.S.G.") range of 81 to 87 months' imprisonment.

I. Background

The defendant stands convicted, following a guilty plea pursuant to a plea agreement, of possessing with intent to distribute cocaine base, in violation of Title 21, United States Code, Section 841(a)(1), and possessing a firearm during and in relation to a drug-trafficking crime, in violation of Title 18, United States Code, Section 924(c)(1)(A)(i). See Presentence Investigation Report ("PSR") ¶¶ 1-3.

The defendant's conviction stems from his arrest by the New York City Police Department ("NYPD") on March 27, 2019. PSR ¶ 5. At approximately 3:00 p.m. that day, multiple NYPD officers assigned to the NYPD's Brooklyn South Narcotics Bureau were driving in an unmarked police van on Rockaway Parkway in the Brownsville section of Brooklyn, New York. To the right of the police van, on the sidewalk, two NYPD detectives observed the defendant engaging in an apparent hand-to-hand drug transaction in front of a residential building. PSR ¶ 5.

After the transaction, the defendant entered the front door of the residential building and went into the lobby. PSR ¶ 5. NYPD detectives followed the defendant into the building's lobby and confronted the defendant as well as the woman who had purchased narcotics from him. When the officers went to arrest the defendant, he refused to comply and began to argue. PSR ¶ 5. As captured on surveillance video, a significant struggle ensued as the officers then attempted to arrest the defendant. During a struggle, two additional patrol officers, who were already inside the building on an unrelated matter, came upon the scene and began to assist the detectives in attempting to subdue the defendant. All told, it took at least four officers to subdue the defendant. During the struggle, one of the detectives saw a black firearm in the defendant's waistband. The detective removed the firearm from the defendant's waist and handed it to two additional officers who had entered the lobby of the building.

During a search of the defendant after his arrest, a detective recovered multiple clear plastic bags of a white, rock-like substance from the defendant's pants pockets, which appeared to be cocaine base (i.e., crack cocaine). PSR ¶ 6. Following his arrest, the defendant was taken to the NYPD's 67th Precinct, where was he was read Miranda warnings, waived his rights, and agreed to speak with an NYPD detective. During a recorded interview, the defendant, stated, among other things, that the firearm belonged to him and that he was keeping the firearm for protection because he was selling drugs on another individual's "turf." PSR ¶ 6.

II. Procedural History

On April 2, 2019, the government filed a criminal complaint against the defendant charging him with possession with intent to distribute cocaine base, in violation of Title 21, United Stats Code, Section 841(a)(1); possession of a firearm during a drug-trafficking crime, in violation of Title 18, United States Code, Section 924(c); and being a felon in possession of a firearm, in violation of Title 18, United States Code, Section 922(g). On April 4, 2019, the defendant made his initial appearance before a magistrate judge and was ordered detained. ECF Dkt. No. 4. On May 29, 2019, the grand jury returned an indictment against the defendant charging the same three offenses contained in the criminal complaint.

On November 22, 2019, the defendant pleaded guilty, pursuant to a plea agreement, to Count One of the Indictment (possession with intent to distribute cocaine base) and to Count Two (unlawful use of a firearm during and in relation to drug-trafficking offense). Count Two carries a five-year mandatory minimum sentence.

On May 15, 2020, the U.S. Probation Office ("Probation") issued the PSR. On November 27, 2020, the defendant filed his sentencing letter requesting a sentence of five years and one day imprisonment. ECF Dkt. No. 24 ("Def. Ltr.").

III. PSR and Guidelines Calculation

The government and defendant are in agreement on the Guidelines calculation that should be adopted by the Court for Count One:

Count One: Possession of Cocaine Base with Intent to Distribute

Base Offense Level (§§ 2D1.1(a)(5) & (c)(13))	14
Less: Acceptance of Responsibility (§ 3E1.1(a))	-2
Total:	12

For Count Two, the Guideline provision for the § 924(c) conviction is § 2K2.4(b), which specifies that a term of imprisonment between five years and life must run consecutively to the sentence imposed on Count One.

The PSR differs from the parties' Guidelines calculation principally in the conclusion that the defendant is a Career Offender under Guidelines § 4B1.1. The defendant has filed an objection to that designation by the PSR. The government joins in that objection only as it relates to the defendant's 2015 conviction for criminal sale of a controlled substance in the third degree, in violation of N.Y. Penal Law § 220.39(1).[1] Under controlling Circuit precedent, this drug offense is not a "controlled substance offense" under the Guidelines because the New York drug statute currently criminalizes the sale of certain substances that are not criminalized under federal law. In United States v. Townsend, 897 F.3d 66 (2d Cir. 2018), the Second Circuit held that Guidelines § 4B1.2(b)'s definition of "controlled substance offense" does not include a violation of a state statute that prohibits more substances than are prohibited under federal law, regardless of what substance was actually at issue in the underlying state conviction. Id. at 71. There is no dispute that in May 2015, the New York State definitions of "controlled substances" and "narcotic" drugs swept more broadly than the corresponding federal definitions, and thus the defendant's conviction is not a controlled substance offense under the Guidelines. See also United States v. Swinton, No. 6:15-CR-06055-EAW, 2020 WL 6107054, at *7 (W.D.N.Y. Oct. 15, 2020) ("Like its counterpart found at NYPL § 220.31, this Court concludes that NYPL § 220.39(1) is indivisible and thus, applying Townsend, the categorical approach must be used and the inquiry is limited to whether a "narcotic drug" under NYPL § 220.39(1) is a

[1] The defendant's alternative argument that his prior conviction for assault in the second degree does not qualify as a crime of violence was explicitly rejected by the Second Circuit in United States v. Tabb, 949 F.3d 81, 85 (2d Cir. 2020) ("[W]e find that the substantive crime of second degree assault under N.Y.P.L. § 120.05(2) 'has as an element the use, attempted use or threatened use of physical force against the person of another' and is categorically a crime of violence under U.S.S.G. § 4B1.2.").

categorical match with the [Controlled Substances Act's] definition."); see also id. ("New York's definition of a 'narcotic drug' is broader than its federal counterpart. Specifically, schedule II(b)(1) under New York law regulates '[o]pium and opiate, and any salt, compound, derivative, or preparation of opium or opiate,' but excludes 'apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone, and their respective salts[.]'" (citations omitted)).

Because the defendant is not a career offender, his criminal history category is IV. PSR ¶ 49. With offense level 12, the advisory Guideline range is 21 to 27 months' imprisonment for Count One. With the addition of the five-year mandatory minimum term, the effective Guidelines range is 81 to 87 months' imprisonment.

IV. Applicable Law

In United States v. Booker, the Supreme Court held that the Guidelines are advisory and not mandatory, and the Court made clear that district courts are still required to consider Guidelines ranges in determining sentences, but also may tailor the sentence in light of other statutory concerns. See 543 U.S. 220 (2005); see also 18 U.S.C. § 3553(a). Subsequent to Booker, the Second Circuit held that "sentencing judges remain under a duty with respect to the Guidelines . . . to 'consider' them, along with the other factors listed in section 3553(a)." United States v. Crosby, 397 F.3d 103, 111 (2d Cir. 2005). Although the Court declined to determine what weight a sentencing judge should normally give to the Guidelines in fashioning a reasonable sentence, the Court cautioned that judges should not "return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." Id. at 113.

Later, in Gall v. United States, the Supreme Court elucidated the proper procedure and order of consideration for sentencing courts to follow: "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." 552 U.S. 38, 49 (2007) (citation omitted). Next, a sentencing court should "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, [the court] may not presume that the Guidelines range is reasonable. [The court] must make an individualized assessment based on the facts presented." Id. at 49-50 (citation and footnote omitted).

V. The Appropriate Sentence

The government submits that a term of imprisonment within the Guidelines range of 81 to 87 months is appropriate. Such a sentence is warranted here because each of the defendant's offenses were serious and the defendant's history and characteristics reveal no prior dissuasion from shorter periods of incarceration or community supervision.

The defendant's crimes are unquestionably serious. And the interplay of them—drug dealing coupled with possession of a firearm—exponentially increased the

gravity of both offenses. Illegal firearms in Brooklyn and in New York City as a whole cause significant suffering and hardship on ordinary and law-abiding residents. The defendant has a long and troubling history of drug trafficking offenses and kept the illegal gun to protect his "turf." He intentionally sold crack cocaine in another drug dealer's area, thus inviting violence that the defendant came equipped to meet. The serious risks that the defendant posed to others warrants clear and significant punishment.

The circumstances of the defendant's arrest, coupled with a long-history of parole violations and disciplinary infractions in prison (PSR ¶ 35) indicate that the defendant has little respect for the law and is unlikely to be rehabilitated by the minimum period of incarceration he has requested. The defendant's longest prior sentence to date, in both 1994 and 1998, was three years. After the latter sentence, the defendant was subsequently convicted of 14 offenses, including his conviction in this case. Without a meaningful and substantial penal consequences for his actions, the defendant will continue to commit crimes and threaten the safety of the community.

The Guidelines also fairly reflect the history and characteristics of the defendant. See 18 U.S.C. § 3553(a)(1). The defendant has previously been convicted a violent assault (PSR ¶ 35) and felony drug-trafficking offenses (PSR ¶¶ 32, 46), six trespassing offenses and numerous low-level marijuana possession offenses. Although the defendant is not a "career offender" and therefore not subject to a Guidelines range in excess of 20 years, the defendant has clearly made crime his profession, as his lengthy criminal history reflects. Despite these prior convictions and state sentences of incarceration, the defendant was not deterred from the instant criminal conduct. The defendant had many inflection points in his life when he could have changed his behavior, but he never did. The Court's sentence should be a beacon that forces the defendant to change course.

The defendant's argument that he should receive some leniency because of a "disparity" between crack and powder cocaine also fails to account for the reality of the defendant's crime. (Def. Ltr. at 4). The defendant chose which type of drug to sell. He chose crack cocaine because the sale of crack cocaine is significantly more profitable than the sale of powder cocaine. For every one gram of powder cocaine (which generally costs $35), a dealer can make 16 individual "twists" of crack cocaine, which are generally sold for $10 apiece. There is nothing "political" (Def. Ltr. at 4) about applying clear federal law to a case where a defendant chooses to distribute a particular dangerous narcotic drug on account of his own desire to make a profit.

Finally, the government respectfully requests a significant term of supervised release, here three years, and the entry of an order of forfeiture, as provided for in the plea agreement, as to the firearm and ammunition that belonged to the defendant.

VI. Conclusion

For the foregoing reasons, the government respectfully requests that the Court impose a Guidelines sentence of imprisonment of 81 to 87 months and a three-year term of supervised release.

Respectfully submitted,

SETH D. DUCHARME
Acting United States Attorney

By: /s/ James P. McDonald
James P. McDonald
Assistant U.S. Attorney
(718) 254-6376

cc: Clerk of Court (FB) (by ECF)
Michael Weil, Esq. (by ECF)
Probation Officer Steven Guttman (by E-mail)

Exhibit C

U.S. Department of Justice

United States Attorney
Southern District of New York

United States District Courthouse
300 Quarropas Street
White Plains, New York 10601

November 30, 2020

BY ECF & HAND

The Honorable Alvin K. Hellerstein
United States District Judge
Southern District of New York
New York, New York 10007

Re: *United States v. Jeyson Disla*, 20 Cr. 222 (AKH)

Dear Judge Hellerstein:

The Government respectfully submits this letter in advance of sentencing in this matter, currently scheduled for December 2, 2020 at 11 a.m. For the reasons explained below, the Government submits that a sentence within the corrected Guidelines range of 21 to 27 months' imprisonment (the "Corrected Guidelines Range"), would be sufficient but not greater than necessary to serve the legitimate purposes of sentencing.

A. Factual Background

1. The Offense Conduct

The relevant offense conduct is set forth in part in the Pre-Sentence Report ("PSR"). On February 26, 2020, two men approached the defendant as he walked toward the street from his residence. PSR ¶ 7. The men drew firearms as they ran towards him. ¶ 8. The defendant drew his own firearm, fired his weapon, and ran back to his apartment. ¶ 9. NYPD officers responded to the area and recovered a spent 9mm caliber bullet casing at the scene of the shooting and a live 9mm caliber bullet in the stairway leading to the defendant's apartment.[1] ¶ 11. The spent 9mm caliber casing and 9mm caliber ammunition were not manufactured in New York State. ¶ 15. The defendant was prohibited from carrying a firearm or ammunition because he had previously been convicted in January 2017, in New York County Supreme Court of Criminal Sale of Controlled Substance in the 3rd Degree, in violation of New York Penal Law § 220.39, a felony. ¶ 16.

The next day, on or about February 27, 2020, the defendant was charged by complaint with being a convicted felon in possession of ammunition in violation of 18 USC § 922(g). The defendant remained a fugitive for approximately 10 days, until he surrendered to the Westchester Police Department ("WCPD") and was transferred to federal custody on or about March 9, 2020.

[1] Officers also recovered a .38 caliber revolver with three live .38 caliber cartridges in the chamber from where the defendant's assailants fled. ¶ 13.

2. Detention and Bail Appeal

A bail hearing was held the same day before the Honorable Judge Ona T. Wang, Magistrate Judge for the Southern District of New York. Judge Wang ordered the defendant detained based, in part, on the court's finding that the Government had shown by clear and convincing evidence that the defendant was a danger to the community. The defendant appealed the determination to the Court. The Court denied the appeal by written order dated April 29, 2020. *See* Dkt. 13.

3. The Plea Agreement

The defendant was charged by Indictment on or about March 19, 2020. On or about August 10, 2020, the defendant pleaded guilty, pursuant to written plea agreement, to being a convicted felon in possession of ammunition in violation of 18 USC § 922(g). The plea agreement calculated the defendant's Criminal History Category as II, and calculated the applicable offense level as 21 based on the following:

- Pursuant to U.S.S.G. § 2K2.1(a)(4)(A), the base offense level is 20 because the defendant committed the instant offense subsequent to sustaining one felony conviction for a controlled substance offense.

- Pursuant to U.S.S.G. § 2K2.1(b)(6)(B), the base offense level increases by 4 because the defendant used and possessed a firearm or ammunition in connection with another felony offense, to wit, aggravated assault.

- Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, the Government will move at sentencing for an additional one-level reduction, pursuant to U.S.S.G. § 3E1.1(b), because the defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

The plea agreement accordingly determined that the defendant's Guidelines Range (the "Stipulated Guidelines Range") was 41 to 51 months' imprisonment. The plea agreement added, however, that "[t]he Government agrees with the defense that, in light of the circumstances of the offense, a downward variance from the Stipulated Guidelines Range is warranted."

B. The Presentence Report

The PSR recommends a sentence within the Stipulated Guidelines Range of 41 months' imprisonment because of the defendant's high risk of recidivism. PSR at 17. As the PSR explains, the defendant dropped out of high school in tenth grade, has no verifiable history of employment, and has a pattern of drug abuse. *Id.* In addition, the defendant was terminated unsuccessfully from his previous probation term, which demonstrates his unwillingness to comply with court-imposed supervision. *Id.*

C. The Defense Submission

The defense submission, dated November 25, 2020, asks the Court to impose a sentence of time served. The defense submission argues that the Stipulated Guidelines Range within the Plea Agreement is incorrect because the defendant's prior narcotics conviction does not qualify as a "controlled substance offense." The defense submission accordingly argues that the base offense level should be 14 rather than 20, *see* § 2K2.1(a)(6), and the corrected Guidelines Range should be 21 to 27 months' imprisonment. The defense submission further argues that the Court should impose a sentence of nine months' imprisonment (or time served) because the defendant allegedly purchased the illegal firearm in order to protect himself; was relatively young as the time of the offense (22 years old); has been incarcerated during the COVID-19 pandemic; and has the support and assistance of two sisters and his aunt upon his release.

D. Discussion

1. Applicable Law

As the Court is well aware, the Guidelines still provide important guidance to the Court following *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Because the Guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions," *Gall* v. *United States*, 552 U.S. 38, 46 (2007), district courts must treat the Guidelines as the "starting point and the initial benchmark" in sentencing proceedings. *Id.* at 49. After that calculation, however, the Court must consider not only the Guidelines, but also the six other factors outlined in Title 18, United States Code, Section 3553(a): (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) the four legitimate purposes of sentencing (as set forth below); (3) "the kinds of sentences available"; (4) any relevant policy statement by the Sentencing Commission; (5) "the need to avoid unwarranted sentence disparities among defendants"; and (6) "the need to provide restitution to any victims." 18 U.S.C. § 3553(a)(1)-(7); *Gall*, 552 U.S. at 50 & n.6. In determining the appropriate sentence, the Court must "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing, which are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2).

2. The Corrected Guidelines Range of 21 to 27 Months' Imprisonment Is Correct

The defense submission is correct that at the time of the Plea Agreement, the parties believed that the Stipulated Guidelines Range of 41 to 51 months' imprisonment was the correct Guidelines calculation. For the reasons set forth in the defense submission, however, the Government agrees that the defendant's prior narcotics conviction does not constitute a "controlled substance offense" under § 2K2.1(a). The Government accordingly agrees that the proper Guidelines range is the Correct Guidelines Range of 21 to 27 months' imprisonment.

3. A Sentence Within the Corrected Guidelines Range Is Appropriate in this Case

For the reasons set forth below, the Government submits that a sentence within the Corrected Guidelines Range of 21 to 27 months' imprisonment would be sufficient but not greater than necessary to serve the legitimate purposes of sentencing.

a. The Nature and Circumstances of the Offense and the Need for the Sentence Imposed to Reflect the Offense's Seriousness

First, a sentence within the Corrected Guidelines Range is necessary to reflect the seriousness of the offense. The defendant is not a happenstance victim who purchased a firearm only to protect himself. As the Court has previously recognized based on the evidenced proffered by the Government, the defendant was a "drug dealer engaged in an ongoing and violent feud with a rival drug dealer." *See* Dkt. 13.

Moreover, there is no evidence that that the defendant purchased his illegal firearm *after* he was threatened by this rival dealer. Instead, the defendant admitted in a post-arrest statement that his rival threatened him earlier on the day shooting. The circumstances suggest that the defendant purchased his illegal firearm *before* he was threatened by his rival and did so in order to protect his drug territory.

b. The Defendant's History and Characteristics

Second, the defendant's history and personal characteristics warrant a sentence within the Corrected Guidelines Range of 21 to 27 months' imprisonment. This is the defendant's second felony conviction by the age of 22. His first conviction, at the age of 19, arose from his attempt to sell cocaine to an undercover officer. PSR ¶ 33.

Rather than get his life back on track following that conviction, he failed to report to Probation at least 13 times, failed to comply with a home visit at least 9 times, failed to comply with employment training, and failed to advise the Probation Officer of an address change. *Id.* His conduct was so deplorable that Probation issued a Violation Report stating, "[W]hile on probation, the probationer has been resistant with probation and undermines any effort to effectively supervise him in the community." *Id.* After several unsuccessful attempts by the Probation Officer to bring the defendant into compliance, he was ultimately resentenced to a term of incarceration of six months, ending October 2018. *Id.* Yet within a year and a half of his release, he was involved in a turf war with a rival drug dealer.

c. The COVID-19 Pandemic Does Not Warrant a Departure

The COVID-19 pandemic further does not warrant a departure. As set forth in the PSR, the defendant does not suffer from any pre-existing medical conditions that make him more vulnerable to the virus. He is a healthy 22-year-old male with not history of hospitalizations, medical treatment, or medication. PSR ¶¶ 52-54.

E. Conclusion

For the reasons set forth above, the Government respectfully requests that the Court impose a sentence within the Corrected Guidelines Range of 21 to 27 months' imprisonment, as such a sentence would be sufficient but not greater than necessary to serve the legitimate purposes of sentencing.

Respectfully submitted,

AUDREY STRAUSS
Acting United States Attorney

By: _____
Mathew S. Andrews
Assistant United States Attorney
(212) 637-6526

Exhibit D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 18 cr 865 (VEC)

JOSE SANTANA,

Defendant.

Sentence

----------x

New York, N.Y.
August 22, 2019
3:00 p.m.

Before:

HON. VALERIE E. CAPRONI,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
BY: BENJAMIN SCHRIER
Assistant United States Attorney

FEDERAL DEFENDERS OF NEW YORK
Attorney for Defendant
BY: IAN M. AMELKIN

Also Present:
Karen Brill, Intern, U.S. Attorney's Office

psychologist. It also included letters from the defendant, his uncle, a cousin, two of his sons, and a friend. The submission also included a number of certificates and reports from the MCC, including his educational report and work evaluation. I also received a letter, dated August 19th, responding to the government's argument regarding the correct guidelines calculation and attaching a transcript from a recent sentencing that was held in front of Judge Furman.

I received a submission from the government, dated August 13, 2019, and one dated August 14, 2019, that included two video clips. The defendant pled guilty to one count of being a felon in possession of a firearm. The presentence report reflects the guidelines level of 21, criminal history category six, which yields a guideline range of 77 to 96 months.

There are two disputes: First, whether the base offense level is found in 2K2.1(a)(4)(A), based on one prior controlled substance conviction, or in 2K2.1(a)(2), because the defendant has at least two prior felony convictions for controlled substance offenses.

And second, whether the enhancement in 2K2.1(b)(6)(B) applies because the defendant possessed the gun in question in connection with another felony offense, specifically first-degree reckless endangerment, in violation of New York penal law 120.25.

So let's deal with the first issue.

MR. AMELKIN: Your Honor, before you start, I just want to make sure you received the letter that we submitted today from his aunt, the person who raised him. We had an additional --

THE COURT: I did not. But we'll pull it up right now.

MR. AMELKIN: Okay. If you want, I could pass you up a hard copy.

THE COURT: If you could pass me up a hard copy, that would be great.

MR. AMELKIN: Sure. We received it this morning, and we filed it this morning as well.

THE COURT: Okay. Hang on just a sec. Let me read it, and then we'll talk first about the prior controlled substance offenses and then about the question of whether the gun was possessed in connection with the felony offense.

MR. AMELKIN: Thank you.

THE COURT: Okay. I've read that letter as well.

Who would like to be heard on the issue of whether there are two prior controlled substance offenses?

MR. AMELKIN: I mean, it's their burden. I'm happy to go first but --

THE COURT: Well, I think the government should probably go first.

Probation has decided there's only one, right?

MR SCHRIER: Yes, your Honor. That's correct.

So, for the most part on this point, the government rests on its written submission. The government believes this is controlled by analogy to *Doe v. Sessions* -- obviously not directly on point, but we think it is fairly analogous. I just wanted to orally respond to some of the points that defense counsel made in his reply to the government's submission.

THE COURT: Okay.

MR SCHRIER: So, first, defense counsel -- or a significant percentage of that reply is devoted to this hypothetical and the argument that absurd results would flow from the government's proposed method of comparing the state schedule in effect from the time of conviction with the federal schedule in effect also at the time of the conviction.

But if you tweak that hypo just a little bit, it shows how results that are no less absurd would flow from defense counsel's formulation. So, for example, imagine with defendant A and B, in defense counsel's example, if instead of being convicted of the state controlled substances offense back long before the sentencing, instead of them being convicted on days that are different from one another, they're convicted on the exact same day of the exact same offense. But then, instead of being sentenced on the same day, they're sentenced one day apart. And after defendant A is sentenced on the first day,

the DEA, or some other regulatory agency with appropriate authority, changes the scope of the controlled substances schedule. That would result in a different guidelines level for defendant A and defendant B, even though they are convicted on the exact same day of the exact same offense originally regarding the controlled substance offense. So I would submit that that's no less absurd an outcome than what the government is proposing. Indeed, I would submit it is more absurd.

To return to *Doe v. Sessions*, yes, it's an immigration case and, yes, the concern that an alien would have about the potential removability consequences is much more of a real concern, a practical concern, than a defendant pleading guilty to a state offense, wondering if perhaps some day this will be essentially a predicate for a guidelines enhancement if they're convicted of a federal offense. But I think that the general thrust of *Doe v. Sessions* -- and there's language that I will quote from *Doe v. Sessions* that I think supports this notion -- is that what you should really be able to determine at the time you plead guilty to that state conviction is, what are the legal consequences which will flow from your conviction at that date, at that time, not subject to a future regulatory decision that does not have any specific bearing on your case.

So, specifically, there's this paragraph in *Doe v. Sessions* -- and I'll quote. It says: "As the BIA has noted, the CSA schedule is a moving target. Since 1970, approximately

160 substances have been added, removed or transferred from one schedule to another. A petitioner's removability should not, as a rule, be based on fortuities concerning the timing of the petitioner's removal proceedings or DEA rule-making."

And I think in this case similarly, the question of whether the base offense level is 24 or 20, should be determined by looking to what was known to everyone, what were the facts in existence at the time of conviction, not regulatory changes that are made long after that.

Additionally, I would note that the government is not aware of any published decision in the Circuit that has directly addressed this issue, you know, which federal schedule do you look at, time of state conviction or current. But the government is now aware of a ruling by Judge Koeltl in a case called *United States v. Ferrer*. And the sentencing hearing in that case was held on November 16th, 2018, in which Judge Koeltl applied *Doe v. Sessions* and found that the state schedule in effect at the time of the state conviction should be applied to the federal schedule in effect at that exact same time, and rejected the specific argument that defense counsel is making here.

THE COURT: Okay. Thank you.

Mr. Amelkin?

MR. AMELKIN: Thank you, your Honor.

Before going into those arguments, I want to ensure

that the state of play is such that the Court agrees with us that we're operating under the premise that, first, we all agree that, if convicted under 220.44 today, it would not count.

THE COURT: That's my understanding, yes. And I agree.

MR. AMELKIN: Right. And that we also --

THE COURT: Because there are some minor differences in the twos schedules that have nothing to do with the drug that this defendant was involved with. Just kind of bizarre.

MR. AMELKIN: Right. And then the second thing we agreed on is that the New York statute is the same today as it was in 2009. However, it's just the federal schedule is narrowed.

So I want to go to the government's point about A and B in his hypothetical. The Court knows this, but the Second Circuit has said, you apply the earlier guideline manual in that situation, if it's beneficial to the defendant. And that's *Guerrero*. It's a 2018 case that was published after *Townsend*, that says as much, that, if at the time of the crime, and at the time of sentencing the guidelines are not in my client's favor, you would apply the earlier guidelines.

THE COURT: Right.

MR. AMELKIN: So that solves that problem.

So let's just talk about *Doe* and whether or not it

makes sense to apply that rule here. And I think that we shouldn't for several reasons. *Doe* follows the INA and is not a guidelines case. And the guidelines provide the temporal choice of law. The guidelines say that you apply the book that you have in front of you at the time of sentencing. And then the guidelines incorporate the definition of the Controlled Substances Act within its text. So it flows that the definitions within the CSA are the same definitions that are in effect at the time of the guidelines being used.

So, I think that 353(a) is really the controlling statute here. Yes, there's no case law on point, but the statutory text is clear. And that makes sense within this immigration guidelines context. There are so many terms under the INA which are different than under the guidelines. For example, if you plead guilty to a misdemeanor in federal court, and the judge gives restitution over $10,000, under INA law, that's an aggravated felony; but, of course, under the guidelines, it's considered a misdemeanor and would only count for one point.

The other thing -- there's a few other matters I wanted to raise, which is just again on Monday, the Second Circuit issued an opinion in *Parkins*, in which they said -- which has been known for a long period of time -- that the rule of lenity applies to the guidelines. If it's at all unclear what to do in this situation, the tie goes to the defendant.

I think, otherwise, Your Honor, probation's right, that *Townsend* controls here, that it would lead to -- I believe that it would lead to absurd results if the Court would have to apply multiple books for multiple different convictions based upon the date of conviction and determine under the categorical approach which applies, it's good judicial economy, it's good for justice to apply the book at the time of sentencing, regardless of when the defendant was convicted of the state offense.

I just want to make sure. I think that unless the Court has specific questions, those, I think, are the main points. And under the rule of lenity and applying *Guerrero* and applying the guideline book, we should not count these four points.

THE COURT: Okay.

Mr. Schrier.

MR SCHRIER: I just want to very briefly respond, your Honor.

I would just note that, yes, the guidelines says you apply the guidelines in effect at the time. And then the guidelines, in turn, refer to the CSA, but they do not that say you apply the CSA in effect at time of sentencing. Right? It's just a reference to the guidelines. And Mr. Amelkin can correct me if I'm wrong, but I'm pretty sure that the INA essentially does the same thing, it refers to the CSA, just

like the guidelines refer to the CSA. But it doesn't specify you apply the CSA at what particular time. And, yes, in *Sessions* the court held that, yes, as a reference to the CSA. That doesn't mean you automatically apply the version of the CSA in effect.

THE COURT: Okay.

MR. AMELKIN: I just want to make one more point, your Honor, if that's okay.

THE COURT: You don't need to.

MR. AMELKIN: Okay. Very good.

THE COURT: Okay. On the first issue, whether the defendant has two prior controlled substance offenses, I concur with probation and the defense. In *United States vs. Townsend*, 897 F.3d 66 (2d. Cir. 2015), controlled substance offense, as used in the guidelines, is an offense under federal law. *Townsend* makes clear that if the state offense is broader than the federal offense, then a violation of the state offense does not qualify. The question then becomes whether with we consider the state and federal schedules at the time of the offense or at the time of sentence.

I agree with the defense that the entire structure of the guidelines in 18 U.S.C. Section 3553(a)(4)(A)(ii) requires that determination be made at the time of sentence. It would make no sense for two defendants sentenced on the same day, with the same offense, with the exact same criminal history, to

have different basic offense levels because one previous conviction, in which state and federal offenses were the same, and one previous conviction which was different. Thus, I agree with probation that the base offense level is 20, because the defendant has a prior controlled substance conviction, namely, his federal conviction in 1996. That said, the fact that he actually has at least three other felony drug convictions might warrant an upward variance or sentence at the top of the guidelines.

All right. Let's talk about the second issue, Mr. Schrier.

MR SCHRIER: Yes, your Honor.

So, again, for the most part, we rely on our written submission. But, again, I would like to orally address some of the points defense counsel made in --

THE COURT: Let me just say for the record also. I've viewed both of the videos several times.

MR SCHRIER: Thank you, your Honor.

So, first, I just want to start with this issue of *Diaz*, this case that Judge Furman recently decided in which he found that the defendant had not committed reckless endangerment in the first degree, such that the four-level enhancement didn't apply.

And I wanted to correct what I think is an incorrect characterization of the facts of that case, and defense

Exhibit E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	*	Docket Nos. 1:11-cr-00251-WMS-HKS-1 and 1:19-cr-00034-WMS-1
	*	
	*	Buffalo, New York
v.	*	July 1, 2020
	*	9:10 a.m.
	*	
TOMMIE ROLLINS,	*	SENTENCING
	*	
Defendant.	*	
	*	
* * * * * * * * * * * * * * * *		

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM M. SKRETNY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:
JAMES P. KENNEDY, JR.,
UNITED STATES ATTORNEY,
By JEREMIAH E. LENIHAN, ESQ.,
Assistant United States Attorney,
Federal Centre,
138 Delaware Avenue,
Buffalo, New York 14202,
Assistant United States Attorney
Appearing for the United States

For the Defendant:
FEDERAL PUBLIC DEFENDER
By FONDA D. KUBIAK, ESQ.,
MARYBETH COVERT, ESQ.,
100 Pearl Street,
Suite 200,
Buffalo, New York 14202

Courtroom Deputy:
GENEVIEVE S. RADOS

guideline calculation in the plea and agreed not to seek any other departures, the application of any other guidelines provisions or to advocate for a non-guideline sentence.

So that's a lot of concessions, basically, right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. You've read all the stuff that Ms. Kubiak and Ms. Covert submitted, right?

THE DEFENDANT: Yes.

THE COURT: Okay. Nevertheless, to assist me in fulfilling my independent obligation to reach the correct sentencing calculations, your attorney has filed submissions suggesting that the career offender law has developed since the time that you entered your plea, which was not all that long ago, but, you know, roughly two years ago.

In particular, she argues on your behalf that there has been a development in post-Townsend case litigation that calls into question whether your prior drug convictions qualify as predicate convictions.

In that Townsend case -- we're in the Second Circuit and those judges held that the term, "controlled substance" in the sentencing guideline section 4B1.2(b) refers exclusively to drugs listed under the Federal Controlled Substances Act, thus precluding a state statute that, "speaks more broadly than its federal counterpart" from serving as the basis for a predicate conviction for a career offended -- offender status, and that's

the Townsend case.

That's 897 f.3d 68 (2018), and one of our judges here from this district was sitting on the Appellate Court and actually authored that majority opinion.

In short, if the state conviction fell under a statute that criminalizes more substances than the Federal Controlled Substances Act -- and that makes it more expansive, a conviction under the statute cannot serve as a predicate conviction for career offender status, and that would be to your benefit.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. This is relevant in determining whether indivisible state statutes, those that define a single crime that can be committed under various factual scenarios, are categorical matches to their federal counterparts.

So if the elements of the prior state conviction are the same as or narrower than the federal counterpart for that crime, the prior state conviction is a predicate conviction.

But if the elements of the state conviction are broader, the prior state conviction does not serve as a predicate conviction.

So at issue here are your prior convictions under New York Penal Law, Section 220.39(1), which criminalize the sale of a narcotic drug and Section 223.34(1), criminalizing the sale of

a narcotic preparation.

Those convictions are from 2002 and 2005, respectively. Both involve indivisible statutes that require an application of the categorical approach analysis that I just described. In other words, the comparison of the state statute with the federal counterpart to that state statute.

The parties agreed that at the time of your conviction in -- convictions, plural, in 2002 and 2005, the state and federal schedules aligned. They were together.

Such that a conviction for either state offense that you were convicted of constituted a conviction for a controlled substance offense under the career offender guideline.

But on January 23, 2015, the opium derivative Naloxegol, N-a-l-o-x-e-g-o-l, was expressly excluded from the Controlled Substances Act, yet that remained on the state schedules.

As a result, the state statutes under which you were convicted now criminalizes a broader range of substances than the federal counterparts.

And, therefore, under Townsend, your conviction seemingly cannot serve as a predicate conviction for career offender purposes.

So the dispute is whether a district court, like myself, should look to the schedules in place at the time of conviction or at the time of sentencing, which is today.

The development in the law that you rely on through your attorney is a bench decision by Judge Vilardo, who authorized Townsend in United States versus Vincent Gibson, 19-cr-66.

In Gibson, Judge Vilardo noted the statutory requirement in 18 USC Section 3553(a) that courts apply the version of the guidelines in effect on the date of sentencing, today, and cited the rule of limine as requiring the court to apply the comparison most beneficial to the defendant who's being sentenced, which was to compare the schedules in effect at the time of sentencing.

Now, there are two judges, District Judges Caproni and Sebold, of the Seventh District, that's the Manhattan area. They have reached similar decisions on that issue.

But I note, as does the Government, that in both Townsend and its summary opinion in Sadler, Second Circuit 2019, the Second Circuit analyzed the schedules in effect at the time of conviction, not at the time of sentencing.

It appears, however, that the time of conviction versus the time of sentencing issue was not before the Court. And it is unclear whether there was any difference between the two time periods for purposes of conducting the required analysis.

Instead, it appears that the Court may have simply defaulted to time of conviction without critically analyzing

whether that was consistent with the structure of the guidelines as a whole.

Accordingly, I do not consider either Townsend or Sadler to be binding precedent in this issue. Instead, I agree with Judge Vilardo's analysis.

The structure of the guidelines is such that you be assessed under the current state of the law. By statute, district courts, like myself, are required to apply the guidelines manuals in effect at the time of sentencing, see 18 USC Section 3553(a)(4)(ii).

In my judgment, it reasonably follows from that mandate that the sentencing court must also apply the current version of any cross reference or corollary necessary to complete the guidelines calculations, such as the controlled instances schedules at issue here.

And given the rule of limine, which is to give you the benefit of the doubt, this is particularly so where that application yields the most beneficial result to the defendant.

Consequently, I find that neither of your past controlled substances offenses, those convictions, qualify as predicate convictions. They don't, because the state schedule applicable to each is broader than the Federal Controlled Substances Act.

So, Mr. Rollins, under that analysis, you are not a career offender under the guidelines for sentencing purposes

today.

It's a big deal, right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Since I find that the career offender enhancement in US Sentencing Guidelines, Section 4B1.1(b)(3) does not apply, the guidelines calculations are a total offense level of 19 and a criminal history category of VI, which yields a substantially different guideline from what you were facing, and that is 63 to 78 months imprisonment.

I find these to be the correct guidelines calculations in this case. Those are my findings. That's my decision. Okay.

Now -- so, we have a total offense level of 19, a criminal history category of VI, 63 to 78 months. Supervised release is three years. Ineligibility for probation and a fine range of $30,000 to one million dollars, or the violation of supervised release with respect to 11-cr-251.

My findings are that that is a Grade A violation, a criminal history category of VI, an advisory range for custody of 24 months and supervised release of three years less current revocation of sentence adjustments.

As far as sentencing, what will be -- I will hear you out. You know, I think, I know the record here. I know Mr. Rollins pretty well from everything that's been submitted.

You know, it's like trying to sentence two different

Exhibit F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 19 Cr. 177 (GBD)

TUREAN BUTLER,

Defendant. Sentencing

----------x

New York, N.Y.
February 12, 2020
10:30 a.m.

Before:

HON. GEORGE B. DANIELS,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
BY: EMILY A. JOHNSON
Assistant United States Attorney

FEDERAL DEFENDERS OF NEW YORK INC.
Attorneys for Defendant
BY: IAN H. MARCUS AMELKIN, ESQ.

(Case called)

THE LAW CLERK: Will the parties please rise and make their appearances, beginning with the government.

MS. JOHNSON: Good morning, your Honor. Emily Johnson for the government.

THE COURT: Good morning, Ms. Johnson.

MR. MARCUS AMELKIN: Good morning, your Honor. Ian Marcus Amelkin of the Federal Defenders of New York on behalf of Mr. Butler. We're joined in the courtroom today by Mr. Butler's partner, Anis Lebron, as well as his cousin Jaden Butler, and Ms. Lebron's children, who Mr. Butler cares for.

THE COURT: All right. Have you received a copy of the presentence report and had an opportunity to review it with your client?

MR. MARCUS AMELKIN: I have, your Honor.

THE COURT: Do you have any objections or corrections to the report itself other than we'll discuss in a moment the calculation of the guidelines?

MR. MARCUS AMELKIN: Well, I don't have an objection to the calculation of the guidelines. I believe the government does. But I think the government and I are both in agreement that paragraph 32 and paragraph 33, which assigns one point for two misdemeanors that he received in 2006, should be zero points and not one point, because they're timed out.

THE COURT: 32 and 33?

MR. MARCUS AMELKIN: That's correct.

THE COURT: And does that --

MR. MARCUS AMELKIN: It does not change the criminal history category.

THE COURT: All right.

MR. MARCUS AMELKIN: But it's possible -- sorry, your Honor.

Yeah, that doesn't require any other corrections.

THE COURT: All right. Then why don't I hear from the government first with regard to the guideline range and with regard to sentence. Ms. Johnson?

MS. JOHNSON: Sure.

So defense counsel is correct that the government is objecting to the guidelines range as calculated by probation in the PSR. Excuse me.

THE COURT: Would you like some water?

MS. JOHNSON: I think I'm okay. Oh, thank you.

The question that we have to decide here is whether Mr. Butler's 2005 conviction for criminal sale of controlled substance in the third degree in New York State qualifies as a controlled substance offense.

THE COURT: Well, it was not a criminal conviction.

MS. JOHNSON: It was a criminal conviction.

THE COURT: It was a youthful offender adjudication.

MS. JOHNSON: The only information we have on it is

what is in --

THE COURT: That's what I'm asking.

MS. JOHNSON: -- the PSR. It is under the adult criminal conviction section. Our understanding is it was sealed. The government only learned about it when probation issued the PSR. It does say, "Adjudicated youthful offender on May 27, 2005." So I suppose it's a youthful offender conviction. I can't really tell from the information in the PSR.

THE COURT: Well, wouldn't that make a difference, whether it's a conviction or not? I thought your position was that because it was a prior -- are you treating it as a prior felony or misdemeanor conviction?

MS. JOHNSON: Yes. It counts under the guidelines because probation was revoked in 2007 and so the sentence that he served for this case goes into the period that would be counted by the guidelines, as a felony conviction.

THE COURT: So you believe the guideline range should be what?

MS. JOHNSON: I believe the guideline range should be 77 to 96.

THE COURT: To 96?

MS. JOHNSON: Yes.

THE COURT: And was there a plea agreement or *Pimentel* letter exchanged?

MS. JOHNSON: There was a *Pimentel*. The defendant pled open. It was not listed in the *Pimentel* because the government didn't know about the conviction. It was sealed. We only learned about it when probation issued the draft PSR.

THE COURT: So the *Pimentel* letter calculated the guideline range without that adjudication.

MS. JOHNSON: That is correct.

THE COURT: In the same manner that the probation department did.

MS. JOHNSON: That is correct.

THE COURT: Okay.

MS. JOHNSON: And the government asserts that this conviction should count as a prior controlled substance offense, and thus the base offense level under the Sentencing Guidelines would be 24 instead of 20. The reason for this is that -- it's a little convoluted, but *Townsend*, which is a Second Circuit case, defined controlled substances under the guidelines as substances that are controlled by the federal Controlled Substances Act, and said that to the extent that the state criminalizes something more broadly than the federal government does, that that can't be a predicate for the guidelines purposes. But *Townsend* doesn't tell us how we compare these drug schedules. It tells us to compare them; it doesn't tell us how to compare them and what time to use to compare them, and so that's how we get into these details about

what time is appropriate.

The defendant would like to compare the New York State drug schedule as it existed in 2005, when the defendant was convicted, with the 2020 federal Controlled Substances Act. The government thinks that the proper way to compare those two drug schedules is an apples-to-apples comparison at the time of the original state conviction, arguing by analogy to *Doe v. Sessions*, which is a Second Circuit case. In the immigration context, that says that because the drug schedules do change so frequently, when a defendant pleads guilty, he should be able to understand the consequences of his conviction. One would never be able to understand the consequences of a conviction in 2005 if you're going to be sentenced at some future point and the drug schedule then will be compared to 2005. There are 15 years between these two dates. The federal drug schedule is amended incredibly frequently due to the fact that new drugs are discovered, new uses for previously thought safe drugs were discovered and controlled. During the pendency of this case, from October 2018 until now, the federal drug schedule has been amended 11 times. It's completely illogical to compare these two schedules across 15 years. And the substances that the defendant cites for the differences between these two schedules, they're not -- there are two substances. There's Naloxegol and naldemedine. They're not listed as substances that are controlled on the federal schedule today. What they

are listed as are substances that are explicitly excluded from control. And one thing that highlights like how, you know, completely illogical it is to do a comparison across 15 years is that these drugs did not even exist in 2005. There's no possibility they could have been on a drug schedule or excluded from a drug schedule in 2005 because they were not even in existence. The new drug applications were filed in 2013 and 2016, respectively.

THE COURT: Well, I'm not sure I'm following what comparison that you're talking about. What is being compared and what is the consequence of comparing those two?

MS. JOHNSON: Sure. So *Townsend* tells us that for guidelines purposes, a controlled substance offense refers to something controlled by the federal Controlled Substances Act. But frequently we're dealing with underlying state convictions that are regulated by some kind of state drug schedule.

THE COURT: Right.

MS. JOHNSON: So *Townsend* says that if the state criminalizes more conduct than the federal CSA does, that that prior state conviction cannot count as a controlled substance offense for guidelines purposes.

THE COURT: And that was the case when he was convicted on --

MS. JOHNSON: It was not the case when he was convicted. When he was convicted in 2005, the schedules were

the same.

THE COURT: Okay.

MS. JOHNSON: Now the federal schedule is different than it was in 2005.

THE COURT: Okay.

MS. JOHNSON: And the difference that the defendant points to is not that the federal schedule includes additional items for control, you know, drugs that the federal government is regulating; it excludes specifically two drugs from control. It says, in the definition of opiates, you know, the federal government controls 23 opiates, which are the exact same opiates that the state controls. But the federal government explicitly will not control two substances, and the state schedule does not say that.

THE COURT: Okay.

MS. JOHNSON: Okay. So right now there is a delta between the state schedule and the federal schedule.

THE COURT: Okay.

MS. JOHNSON: But with respect to these substances, there's absolutely no evidence that anyone is trying to criminalize these substances. There are new pharmaceutical products. They're both designed to relieve constipation for people taking opiates. In one of the rulemakings, it says there's never been a drug seizure of these drugs.

THE COURT: Okay.

MS. JOHNSON: Like this isn't -- we're not --

THE COURT: Why do you want to treat it more harshly in federal court than it's been treated in state court?

MS. JOHNSON: At 2005, in the state court, they were the same.

THE COURT: Okay.

MS. JOHNSON: Today there's a difference.

The government thinks that the relevant time period for comparing what conduct was criminalized by the state and what conduct was criminalized by the federal government is at the time of the original state conviction. There's just no meaningful comparison otherwise. Like *Townsend* tells us that --

THE COURT: Why isn't there a meaningful comparison to analyze currently how the law views these substances? If he is to be sentenced now, the consequences that he's suffering with regard to his prior case is going to be suffered presently, and the evaluation should be how seriously should it be handled now to enhance his sentence.

MS. JOHNSON: We think that what *Doe v. Sessions* tells us, which is a Second Circuit case, is that -- yes, it is in the immigration context, but it says that you should look to how substances were regulated at the time of the original conviction, which would be the 2005 conviction in this case, because that is the only point in time at which the defendant

would be able to determine the future consequences of that conviction. When we compare across 15 years, across something like a drug schedule, it's been amended 11 times in the last 18 months, like it's a moving target.

THE COURT: Right. Why does that make it more complicated to assess what the appropriate sentence is for this defendant and this crime, given his criminal history?

MS. JOHNSON: We think that given his criminal history in a prior conviction for a controlled substance offense, we think it should count, because in 2005, when he was convicted, there was absolutely no daylight between New York and the federal system. They criminalized the same conduct.

THE COURT: Well, but in his particular instance, in 2005, his conviction was treated even more lightly than a regular conviction because he got youthful offender treatment, and he technically does not have a criminal conviction for that offense. So I'm trying to understand. I understand the logic of your argument in the abstract, but I'm trying to find the reasonable basis to treat an -- and *Townsend* and the other cases, I don't think any of the cases we're talking about address a situation of a youthful offender treatment in terms of whether or not that should affect how it's evaluated. He received youthful offender treatment on a case where the substances were treated more harshly -- no, equally at the time, but now the substances are not on the controlled

substance schedule.

MS. JOHNSON: Well, the difference between the schedule is simply that the federal schedule explicitly says we're not going to criminalize these two pharmaceutical products --

THE COURT: Right, right.

MS. JOHNSON: -- that no one is suggesting anyone is using in a criminal manner.

THE COURT: Right.

MS. JOHNSON: Judge, it's largely an academic guidelines argument. The government is just --

THE COURT: Well, it's not academic. It's never academic for the defendant. It's academic for you and I because we're not the ones doing the time.

MS. JOHNSON: Understood.

THE COURT: So the real question is, ultimately: (1) what is this we're fighting about; (2) what is the government's position as to what a reasonable sentence is in this case. If the government's position is that a reasonable sentence is at or below the guideline range that they laid out in the *Pimentel* letter, then it seems to me that's where we should start. If your position now has changed and your position is that a reasonable sentence is the higher guideline range that you're advocating, then it's not academic; it has serious consequences for the defendant if I accept that view. And so I'm trying to

understand. I mean, in the abstract, I don't want to set a bad precedent for the government's future arguments, but I'm a little concerned about making that determination in this case, and given the youthful offender treatment and given the *Pimentel* letter and given that the government -- I can only assume that you had an opportunity to convince probation of this point of view and probation took the contrary point of view, and they have calculated the guideline range as the government calculated it in its *Pimentel* letter, and the government is making an argument that the youthful offender adjudication should be an aggravating factor to raise his guideline range beyond what the government believes was a reasonable guideline range when they submitted the *Pimentel* letter.

So I guess I'm really trying to figure out what you really want me to do with this other than, as I say, chalk up a point that the government has made an academic argument that they get to win. But it's never an academic argument for either the defendant or the Second Circuit if I start out with a higher guideline range that's inconsistent with the guideline range as calculated by the probation department, inconsistent with the *Pimentel* letter which the government submitted to the defendant and pursuant to the Second Circuit directive that the government should give the defendant some guidance as to what the guideline range is, and I'm not sure that it's the

government's position that a reasonable sentence in this case is a sentence within the higher range that you're advocating now or is within the range of the *Pimentel* letter.

MS. JOHNSON: Just a few points in response.

I understand what your Honor is saying with respect to the *Pimentel*, but the *Pimentel* specifically says that, you know, this is our guidelines calculation with respect to the information that we had at the present time, and at that time we had no information regarding this conviction because it was sealed. Had we had that information at the time we issued the *Pimentel*, we would have included it and our guidelines calculation would have been the higher one. You know, it is significant to us that, you know, as for the guidelines, this particular guidelines provision, it does make the conduct more serious if there are two prior controlled substance offenses. That is what the guidelines tell us, and our office's position would remain the same. You know, when we found out about this, we do think a sentence in the guidelines range is appropriate, because we didn't actually know about this other conviction --

THE COURT: And have you made this argument successfully before any of the other judges?

MS. JOHNSON: There's a decision by Judge Koeltl that is a very similar circumstance. It involves a 2008 conviction for a criminal sale, the same underlying state conviction, it's a 2008 conviction, where Judge Koeltl said that the schedules

should be compared in 2008 and that the conviction should count under the guidelines.

There was another case that I just recently found out about in front of Judge Kaplan, where he also reached the same conclusion.

There are two other judges who have gone the other way. There's Judge Caproni and Judge Seibel.

THE COURT: And you said Judge Koeltl and Judge --

MS. JOHNSON: Kaplan.

THE COURT: Kaplan?

MS. JOHNSON: Yes.

THE COURT: And Judge Koeltl and Judge Kaplan's cases, what were the prior convictions?

MS. JOHNSON: In Judge Koeltl's case, it was this particular -- it was criminal sale of a controlled substance in the third degree.

THE COURT: And do you know what substance it was?

MS. JOHNSON: We don't. These cases are all analyzed under the categorical approach so no one gets into the details of what the actual underlying --

THE COURT: But that's what you're doing here. You're getting into the details --

MS. JOHNSON: Exactly.

THE COURT: No. You're getting into the details of the underlying substances here.

MS. JOHNSON: We're not. I don't know --

THE COURT: Well, your argument was that we should compare what substances were on the schedule back in 2005 to the substances that are on the schedule presently.

MS. JOHNSON: Right. That's what *Townsend* tells us to do to figure out if federal law is broader or narrower than state law. I thought -- if I misunderstood, I apologize, your Honor. I thought you were inquiring what the substance, what the controlled substance was in this particular conviction. I don't --

THE COURT: No, in the prior conviction.

MS. JOHNSON: In the prior conviction? I don't know what substance was at issue.

THE COURT: And do you know whether or not, in Judge Kaplan and Judge Koeltl's cases, that that was in fact a conviction for a felony, underlying felony conviction or a youthful offender adjudication?

MS. JOHNSON: I believe those were felony convictions. At least for Judge Koeltl's case. I would have to get more information to answer that question with any level of assurance, though.

THE COURT: And you're saying that they did what in their case that should be followed here? I wasn't quite sure I followed that.

MS. JOHNSON: Judge Koeltl said that the prior

conviction should count.

THE COURT: The prior conviction -- okay. But we don't know what the prior conviction was, do we?

MS. JOHNSON: It was a New York conviction for 220.39, which is criminal sale of a controlled substance in the third degree, the same conviction as here.

THE COURT: Okay. But we don't know what the drug was.

MS. JOHNSON: Correct.

THE COURT: And what was the conviction, the current conviction in Judge Koeltl's case?

MS. JOHNSON: Same as here, felon in possession.

THE COURT: And what about Judge Kaplan?

MS. JOHNSON: Judge Kaplan, I don't know what the underlying conviction was. Let me see if I can find it. But the instant conviction for the sentencing in federal court was a narcotics case. I believe it was whether the defendant qualified as a career offender was the question.

THE COURT: And how do you characterize -- if there is a conflict or disagreement between Judge Koeltl and Judge Kaplan and Judge Caproni and -- who was the other judge?

MS. JOHNSON: Judge Seibel.

THE COURT: -- and Judge Seibel, what do you say was the conflict between the two, those sets of judges?

MS. JOHNSON: I think both Judges Kaplan and Koeltl

decided the case on the idea that there should be some apples-to-apples comparison of the drug schedule, which is the government's argument here. I believe Judge Caproni and Judge Seibel decided the case on the argument that the defendant should be sentenced under the law and at the time of sentencing, as the guidelines say, and that sort of any tie goes to the defendant under the rule of lenity. You know, the government asserts there's not really any binding precedent on this. *Townsend* tells us to do this comparison and doesn't tell us how to do it. So, you know, the defendant points out absurd results that follow from the way the government suggests to do it, and I can make those same hypothetical arguments, absurd results following from the way that the defense wants us to do it. You know, the government thinks it's more absurd that you would compare schedules that are constantly changing, across 15 years, because the practical effect of that is that an earlier state conviction for a controlled substance offense will almost never count for guidelines, under any guidelines analysis, because the federal schedule changes with such frequency.

THE COURT: Well, in this case I don't have to evaluate that. That's why I'm trying to factor in the fact that this was a youthful offender adjudication, because none of that really matters to me. It's a youthful offender adjudication, it wasn't a criminal conviction; it was treated less seriously than a criminal conviction, not because of the

substance but because of his youth.

MS. JOHNSON: I mean, with respect to that analysis, I mean, perhaps the best -- I don't -- I think there's conflicting information, and the government hasn't gone to the state to try to unseal the records from this conviction. It is in the PSR under the section Adult Criminal Convictions, and there is a youthful offender section in the PSR that lists additional convictions under juvenile adjudications. I note that it does say adjudicated youthful offender, but if you do the math, the defendant was over 18 at the time he was adjudicated. I'm just not sure, with the information we have in the PSR, how this all played out.

THE COURT: Well, you're saying he was over 18 at the time he was adjudicated or at the time the crime was committed? Because that would be the operative date.

MS. JOHNSON: I'm just doing the math.

I believe he was 18 when the crime was committed. His birthday, according to the PSR, is June 1, 1986, and the date of arrest is November 23, 2004, and he would have been a little over -- he would have been 18 at the date of arrest.

THE COURT: That's assuming that the day of the arrest is the day of the offense.

MS. JOHNSON: That is true, although it is a criminal sale of a controlled substance so --

THE COURT: There are plenty of people selling drugs

today and get arrested tomorrow.

MS. JOHNSON: That is true, but his birthday is in June.

THE COURT: All right. But ultimately is it your position that because of this new information the government has, that a sentence in this higher range is a reasonable sentence?

MS. JOHNSON: That is our position. We do think that had we known about -- this is a significant other conviction. It counts for three criminal history points. You know, he had his probation revoked after this sentence and was reincarcerated as a result, which, you know, has happened a couple of times. We do think it impacts --

THE COURT: Sorry. What page are you on?

MS. JOHNSON: I'm on page 8 of the PSR. It's paragraph 30.

THE COURT: That's the 11/23 --

MS. JOHNSON: Yup.

THE COURT: -- conviction? And his parole was revoked 3/14/2007?

MS. JOHNSON: Yeah.

THE COURT: And let's see what happened.

2007. Do we know why his parole was revoked? Was that a new offense?

MS. JOHNSON: It says a new conviction here, but --

THE COURT: I don't see it.

MS. JOHNSON: I don't see it here and I didn't see it on his rap sheet either. It might be that it's something from another state that's sealed. If you go all the way to the back, on paragraph 47, there's something in September of 2017, where it says fugitive from another state that lists North Carolina. That would be the government's best guess.

THE COURT: All right. Let me hear from the defense. Mr. Marcus Amelkin.

MR. MARCUS AMELKIN: Thank you, your Honor.

So first off, I think that the defense is academically correct or legally correct or morally correct on this point, but I'm concerned about -- while I agree with the Court that the YO should not count, the Second Circuit has made clear that YOs for the most part count and can be used to enhance an offense. So I don't want the Court to be on shaky ground with the YO. I think that the *Rehaif* decision, which recently came out about felon in possession, might be a way in which we can revisit the YO, because under *Rehaif*, it says that you have to know that you were convicted of a crime that made you prohibited from holding a gun. And they found under that case law that YOs wouldn't count in that aspect because as the Court well knows, when you receive a YO, you're told, it's going to be sealed, you're not going to have a criminal conviction, and that's the end of it. But unfortunately, the Second Circuit

has said previously that YOs should be treated as adult convictions.

The bottom line is that the past three judges who have looked at this have gone the defense's way, and while I have enormous respect for Judge Koeltl and I was his intern when I was in law school and love Judge Koeltl, he made that decision without a full briefing and directly after *Townsend* was issued. And I think that the briefing in front of Judge Caproni and the decision made by Judge Caproni is really all the Court needs to think about, which is that the statute really does control here, 18 U.S.C. 353(a), which says that the Court uses the guidelines in effect on the date of the defendant's sentencing.

Now the book that you have in front of you, the red book, is the guidelines that you're going to use to sentence Mr. Butler in a few minutes. Incorporated into that book by way of statute and by of way of guidelines, under 4B1.2(b), is the CSA, the Controlled Substances Act, and the schedule is incorporated into that book. So what the government is asking you to do -- I'm sorry. I'm on duty today. It should still be on silent though.

What the government is asking you to do is say that for prior convictions, you go back into your chambers and you get the light blue book from 2004 for this conviction and use the red book for everything else. And that is fundamentally against what the guidelines are about, which is that the

defendant, at the time of his sentence, knows what he is up against. As Judge Caproni said, the entire structure of the guidelines in 18 U.S.C. Section 353(a)(4)(A)(ii) requires that determination be made at the time of sentence. And Judge Seibel said: If the Court is at all on the fence in Augustine, a tie goes to the defendant. And that's the rule of lenity, which the Second Circuit has said applies to the guidelines several times in recent years. And what the government is asking you to do is saying that, depending upon the time of his conviction, you have to go back and figure out what the CSA said and what drugs were on it and what drugs were off it.

Now in New York, we're really talking about two compounds, but in other states we're talking about a lot of different drugs. In California, for example, stems of marijuana don't count but seeds do. So really, it's a nationwide issue, and I feel for the Court because the categorical approach has opened the door to all of these questions, but the way to simplify it and the way that Judge Caproni and Judge Seibel and just last week Judge Vilardo decided is that you use the book at the time of sentencing, the book incorporates the Controlled Substances Act, and the rule of lenity, if it's close, goes to the defendant. Because otherwise, what the government is saying to you is that the government concedes that right now, if he was arrested yesterday for a 220.39 -- which, by the way, is normally a $10

hand-to-hand sale in a park somewhere; we're not talking about like a big drug situation -- would not count. The government concedes that in their briefing, that today, if he was arrested yesterday, it would not count.

So let's say he has two convictions, one from yesterday and one from 2004. It's asking you, in the same sentencing, for the same prior crime, to use two different standards. And that is simply not acceptable, under the guidelines, under 353(a).

I'll close with this. It's their burden, both as the objecting party but also to apply an enhancement to my client, and they just cannot reach it, because they do not have any direct binding precedent on the Court on point, and we have the better of the logical and academic argument.

Thank you.

THE COURT: Yes.

Ms. Johnson?

MS. JOHNSON: Yes. I just want to clarify one point on Mr. Marcus Amelkin's *Rehaif* argument, just to make sure the record is clear.

I understand what he's saying with respect to youthful offender convictions, but in this particular instance, the defendant does have another felony conviction for which he was sentenced to four years of imprisonment, so I just want the record to be clear on that point, that that is a conviction the

government is relying on for purposes of --

THE COURT: I'm sorry. Say that again. You're referring to which?

MS. JOHNSON: I'm referring to paragraph 38, the attempted robbery conviction.

THE COURT: I'm sorry. I just didn't follow when you say that's the prior conviction that the government is relying upon.

MS. JOHNSON: Right. I just wanted to make clear, because defense counsel made an argument about *Rehaif* in the context of youthful offender adjudications, and I just want to make clear that *Rehaif* tells us that the defendant had to know that he was a felon, and the government is not asserting that he knew he was a felon because of that youthful offender conviction. We're asserting it because of this other conviction.

MR. MARCUS AMELKIN: Nor is the defense, your Honor. Mr. Butler is guilty of being a felon in possession of a firearm. The argument I'm making under *Rehaif* is that I think it opens the door to question whether these YOs can be used to enhance sentences in which they did not know at the time that they pled that it could be used in federal court to enhance their sentence. But that's more to this guideline issue and not to the 922(g). Mr. Butler is here today to be sentenced for having a gun, and he admits that he had it.

THE COURT: All right. I'm at this point inclined to accept the probation's calculation of the guideline range in this case. I think there are several factors. Ultimately I think my reaction is that I agree more with Judge Caproni on this issue than Judge Koeltl. I think there is a compelling argument that, as I say, it sounds logical to go back and compare the guidelines as they existed or the law as it existed at the time of the offense, but I think that that, in my view, is inherently problematic in and of itself that could create consequences that are unintended and inconsistent for the determination of the applicable guideline range, which is required by law. And I think it is somewhat problematic to calculate the guideline range based on an evaluation of two different sets of guidelines.

I'm not sure that if this was further significantly argued on a full record in another case in the abstract, how the circuit would resolve this split among us, but I believe that particularly under the unique circumstances of this case, I think that there's a greater danger that an inappropriate sentence would be applied if I were to apply this rule under these circumstances, given the nature of the prior conviction, given the position the government took in the *Pimentel* letter, although I concede that that is always subject to the current information that the government has available to it at the time. And I'm not sure that I would accept the position that

this 2005 youthful offender conviction, itself, a youthful offender adjudication, would enhance the defendant's culpability to the extent that the guideline range should be raised another year or two as being the more appropriate reasonable sentence.

So I'm going to accept, for these purposes -- and I'll indicate for the record, I don't think that this should be precedent for cases in the future. I think the debate will rage on, and it will be resolved on a more complete and more appropriate record in the appropriate case, for all of us judges to come to some sort of consensus on this issue. But in the circumstances of this case, I do believe it is appropriate to accept the guideline range as calculated by the presentence report, which is consistent with the guideline range that was in the *Pimentel* letter and is consistent with what would be a reasonable sentence -- in that range or below that range -- a reasonable sentence in this case.

So I'm going to accept the total offense level of 17, criminal history category VI, again, which is significantly enhanced, that his criminal history is significantly enhanced by his criminal history of VI, and his total offense level of 17. So I believe that that is an appropriate calculation of the guideline range, and I will accept a guideline range of 51 to 63 months, as was indicated to the defendant in the *Pimentel* letter prior to his plea of guilty.

Exhibit G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	Case No. 1:19-CR-0066
	)	(LJV)
Plaintiff,	)	
	)	
vs.	)	January 31st, 2020
	)	
VINCENT GIBSON,	)	
	)	
Defendant.	)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: JAMES P. KENNEDY, JR.
UNITED STATES ATTORNEY
BY: SETH MOLISANI, ESQ.
ASSISTANT UNITED STATES ATTORNEY
138 Delaware Avenue
Buffalo, NY 14202

For the Defendant: FEDERAL PUBLIC DEFENDER'S OFFICE
BY: JEFFREY T. BAGLEY, ESQ.
ASSISTANT FEDERAL PUBLIC DEFENDER
300 Pearl Street, Suite 450
Buffalo, NY 14202

Court Reporter: MEGAN E. PELKA, RPR
Robert H. Jackson Courthouse
2 Niagara Square
Buffalo, NY 14202

02:07PM THE CLERK: 19-CR-66. United States of America v. Vincent Gibson. Assistant United States Attorney Seth T. Molisani appearing on behalf of the government. Assistant Federal Public Defender Jeffrey T. Bagley appearing with defendant. Defendant is present. This is the date set for a motion hearing.

02:07PM THE COURT: Okay. Good afternoon.

02:07PM MR. BAGLEY: Good afternoon, Judge.

02:07PM THE COURT: So, is this -- was this briefing as a result of an order that I issued?

02:07PM MR. BAGLEY: Yes.

02:07PM THE COURT: Asking for further briefing?

02:07PM MR. MOLISANI: There was a request that defense counsel made at the time of the plea, he wished to submit argument to the Court relative to the career offender status --

02:07PM THE COURT: Yes.

02:07PM MR. MOLISANI: -- at the time and the Court granted that.

02:08PM THE COURT: So, I've got a few questions and let's cut to the chase here. Let me ask the government, first of all, the statute, 18 U.S.C. Section 3553(a)(4)(A)(ii) says that the Court must look to the guidelines at the time of sentencing as opposed to the time of conviction. How do you get around that?

02:08PM MR. MOLISANI: Your Honor, I think that's where you can kind of parse things out a little bit, where if it's really looking to statute rather than the guidelines, the guidelines are what the guidelines are and I think they absolutely -- the present guidelines are the ones that apply, but it's how you interpret those guidelines that depend on other statutes and the interplay between the guidelines and statutes and I think that's where the government's argument stems from, that here we need to look at -- I don't know how far you want me to go.

02:08PM THE COURT: No, go ahead. Tell me, because I'm troubled by -- so, I understand the *Townsend* -- I'm intimately familiar with *Townsend*. The *Townsend* decisions says that based on the Second Circuit's prior determination, you have to apply the categorical approach that you look at the statutes. And if the state statute under which the defendant was convicted criminalizes the possession of a certain substance that is not criminalized under the federal statute, then the state statute doesn't reply, right? Got that?

02:09PM MR. MOLISANI: Correct.

02:09PM THE COURT: All right.

02:09PM MR. MOLISANI: Yes. You have more intimate knowledge of how that decision was rendered.

02:09PM THE COURT: And we've got a drug here that's criminalized under the state statute, but it's not under the

02:09PM federal -- what is the word?

MR. BAGLEY: Controlled substance schedule.

THE COURT: Schedule. It's not under the federal schedule. So, why wouldn't the rule of lenity require me to chose whichever of the two benefits the defendant and apply that?

MR. MOLISANI: Well, I think, Your Honor, that can be decided with the savings statute as well. 1 U.S.C. Section 109 assures that a convicted criminal defendant does not fortuitously benefit from more lenient laws that are passed after he or she has been convicted. And in this case, the defendant was convicted at a time where the schedules were exactly the same.

THE COURT: But, it's not a more lenient law. You're not saying there's a more lenient law that's passed after his convictions.

MR. MOLISANI: I think technically, yes, it is more lenient where certain controlled substances were essentially forbidden and then, something is removed from that schedule well after the time that he was convicted of that offense.

THE COURT: How do you deal with the example that Mr. Bagley includes in his papers where one defendant commits a crime at one time and at another time and we're going to apply --

MR. MOLISANI: I'm sorry, Your Honor. That's no

02:11PM different than any time there's a change in the law. I mean, if you look at -- I've cited this case that, yes, it is in the context of ACCA where the maximum term of imprisonment, say, for a particular drug offense in New York State was, at one time, 20 years. And New York has subsequently gone back and changed its laws to lessen the maximum term of imprisonment for that same offense, for that same conduct.

And yet, the individual who was convicted of now the same offenses, mind you, we look at the time of the actual conviction what the law was at that time. And so, there is a disparity, unfortunately and unfortunately for any defendant where there's a situation like this where there is a change in the law and it results in one defendant facing a greater penalty than the other, but I'm not sure how you get around that.

And I think another point that should be brought up with Mr. Bagley's argument is, let's say, for instance, that New York State now decides to remove Minoxidil from its controlled substance list tomorrow. Then, Mr. Gibson would now become a career offender because he's not to be sentenced until the end of February? These issues come up all the time.

THE COURT: Let me ask you this. Judge Caproni and Judge Seibel both issued decisions that seem to be contrary to your position, right? You can't distinguish them, can you?

MR. MOLISANI: No, there definitely seems to -- I

02:12PM 1 mean, there's no clarity here and that's why we're here
02:12PM 2 arguing --
02:12PM 3 THE COURT: Yes.
02:13PM 4 MR. MOLISANI: -- there's not anything that
02:13PM 5 definitive on that issue.
02:13PM 6 THE COURT: Those two judges decided against you,
02:13PM 7 right?
02:13PM 8 MR. MOLISANI: Correct.
02:13PM 9 THE COURT: Do you have anything -- any court that
02:13PM 10 has actually considered this? I know you have the Second
02:13PM 11 Circuit case, but the Second Circuit case doesn't really seem
02:13PM 12 to consider this issue. And as Mr. Bagley points out, it's
02:13PM 13 a -- what's the word that they use for non-precedential
02:13PM 14 opinions?
02:13PM 15 MR. MOLISANI: Summary order.
02:13PM 16 MR. BAGLEY: Summary order.
02:13PM 17 THE COURT: Summary order. Yeah. So, it's a summary
02:13PM 18 order that is non-precedential by the Court's own rules,
02:13PM 19 right? So, you've got that one case that seems to come out
02:13PM 20 your way that does not really address the issue straight on.
02:13PM 21 And then, you've got an immigration case that I don't think is
02:13PM 22 of -- is on point, because it's an immigration case and not a
02:13PM 23 guidelines case. Is there any case that you have where a
02:13PM 24 court has addressed this issue and has come out your way?
02:14PM 25 MR. MOLISANI: Well, I think Mr. Bagley addresses

02:14PM 1 that. I cited the *Warren* decision from the Southern District
02:14PM 2 of New York that held that 2012 criminal sale conviction, the
02:14PM 3 220.39-1, which this defendant was also convicted of, was a
02:14PM 4 controlled substance offense. Mr. Bagley notes that that same
02:14PM 5 judge later revisits that. So, I don't have --
02:14PM 6 MR. BAGLEY: It's Judge Seibel.
02:14PM 7 THE REPORTER: Judge what?
02:14PM 8 THE COURT: Seibel. S-E-I-B-E-L I think it is. So,
02:14PM 9 you really don't have one?
02:14PM 10 MR. MOLISANI: I have not seen something.
02:14PM 11 THE COURT: Okay.
02:14PM 12 MR. MOLISANI: That's not to say that in the next
02:14PM 13 five months, there's won't be another decision.
02:14PM 14 THE COURT: This is not an easy case intellectually.
02:14PM 15 This is not -- I don't mean to make short of your argument, I
02:15PM 16 get it, and it's not easy conceptually for me because, you
02:15PM 17 know, you're right. There are considerations that goes both
02:15PM 18 ways. Mr. Bagley, anything you want to add?
02:15PM 19 MR. BAGLEY: Judge, I did try to think of a way to
02:15PM 20 try to simplify why it is that you apply the statute and apply
02:15PM 21 the guidelines at the time Mr. Gibson is being sentenced and I
02:15PM 22 think that's -- first of all, it's straightforward. That's
02:15PM 23 what the law says. That's what the guidelines say. If
02:15PM 24 there's any issue with that, then I think you can -- I think
02:15PM 25 I've come up with an example that maybe makes it even easier,

02:15PM because I've struggled with it too, Judge. And that is, let's pretend that we're in an ACCA context, all right? So, you're an armed career criminal in this context. For that, as you know, Judge, just to lay the ground work, you need three predicates and then a current gun possession charge.

So, let's say somebody in Mr. Gibson's position has a burglary charge, for instance, in 2012, 2013 and 2014. And then, in 2015, Congress says, you know what, burglary is no longer a predicate for purposes of ACCA. And in 2018, Mr. Gibson or somebody in his position possesses a firearm. There's no way that the government would be coming in here and telling you, well, look, Judge. In 2012 and in 2013 and 2014 when those burglaries were committed, burglary was a predicate for purposes of ACCA. That simply is kind of preposterous, right?

So, that, I feel, it makes clear that you look at the law at the time when the person is being sentenced. So, a person being sentenced in 2018 when burglary is no longer an ACCA predicate, he doesn't have any burglary predicates. He doesn't have any predicates for purposes of ACCA. So, I don't know that that helps, but just another way to think about it.

The savings clause, Judge, just quickly, I think that my reading of that would apply in the context where, again, to put it in Mr. Gibson's position, if Mr. Gibson -- for instance, if the Congress changed the laws to make federal

02:16PM bank robbery no longer a crime under federal law, then he
02:17PM couldn't, by virtue of the savings clause come back before you
02:17PM and say, Judge, I'm not guilty of this crime. They'd have to
02:17PM make it retroactive. I think that's what the savings clause
02:17PM says. I don't think it applies here.
02:17PM And then, finally, Judge, I'm not going to belabor
02:17PM those points anymore. There is this issue of attempt that is
02:17PM still floating out there. I filed a supplemental brief with
02:17PM your permission arguing that even if the Court were to find
02:17PM the 220.39 is a controlled substance offense for purposes of
02:17PM the career offender guideline, that an attempt to do so would
02:17PM not be. The government filed a response to that arguing that
02:17PM it's settled law under *Jackson* from 1995 that the application
02:17PM note to the guidelines are authoritative.
02:17PM I just simply ask, Judge, you didn't really set a
02:17PM reply for that. I realize I probably could have replied, if I
02:18PM wanted to. I don't think you have to even get there. I'd ask
02:18PM that if you are going to get there Judge, you give us an
02:18PM opportunity to submit some more briefing on that, because I
02:18PM think it is an open question.
02:18PM THE COURT: Is that the issue where the DC Circuit
02:18PM and the Sixth Circuit have weighed in in your favor?
02:18PM MR. BAGLEY: Yes. I don't know if it's DC. I know
02:18PM it's Sixth Circuit on bond and I'm not sure the other one off
02:18PM the top of my head.

02:18PM THE COURT: I think it's DC.

02:18PM MR. MOLISANI: I believe it's DC.

02:18PM MR. BAGLEY: So, those courts have weighed in *en banc*. I know for sure the Sixth Circuit, Judge. The government cites *Jackson*. That is the summary order that says that it's an open question. So, there is -- it's not -- those are very murky waters, Judge. I'd like the time to brief that if you have to get to it. My position is you don't even have to get there, Judge, because 220.39 under the New York State statute is broader than the federal statute.

02:18PM THE COURT: Yeah. I agree with defense. And I'm not going to get there, not just because I want to dodge a tough issue. I do think that you're right on this. I'm going to agree with Judge Caproni and Judge Seibel. I think that it doesn't qualify because of *Townsend*, because of what the court said in *Townsend*.

02:19PM I understand where you're coming from, Mr. Molisani and I think you've done as good a job as you can making the argument, but I just find based on all the considerations that we're talking about, the rule of lenity and all the considerations that we're talking about, that applying the current law is the way to do it. So, that's what we're going to do.

02:19PM MR. MOLISANI: So, hopefully New York does not change and drop Miloxadil.

02:19PM THE COURT: Let's hope not, by the time of sentencing okay. Thank you folks very, very much.

02:19PM MR. MOLISANI: Thank you.

02:19PM THE COURT: And we'll see you at -- sentencing is just a few weeks away?

02:19PM MR. BAGLEY: It is, Judge, yes.

02:19PM THE COURT: So, we'll see you at sentencing.

02:19PM MR. BAGLEY: Judge, there is -- if I could have a housekeeping point. So, there was an issue that I believe probation resolved for me. I have not submitted a statement with respect to sentencing factors yet. It was due a week ago. So, I believe that I will have no objections to the presentence report because there's --

02:20PM THE COURT: Your time is preserved, if that's what you are asking.

02:20PM MR. BAGLEY: If I -- Judge, I'm actually more worried about complying with the Court's order that I submit the statement and if I do have objections, I don't -- I certainly would be asking for more time and allowing everyone more time to respond to my objections.

02:20PM THE COURT: Don't worry about that. Submit a statement with respect to sentencing factors when you can submit it. If it's clean, if you are not objecting to anything, Mr. Molisani is not going to have any problems. And if there are some objections, we're going to need more time

02:20PM and I'll give you more time.

MR. BAGLEY: Thank you.

THE COURT: Okay. And you have no objection to that?

MR. MOLISANI: No.

THE COURT: Great. Perfect. Okay. Thanks everybody.

(End of proceedings.)

* * * * * * *

I certify that the foregoing is a correct transcription of the proceedings recorded by me in this matter.

s/ Megan E. Pelka, RPR

Court Reporter,

Exhibit H

20199jaugusf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

v. 17 CR 753(CS)

SENTENCE

JERRY AUGUSTINE,

Defendant.

----------x

United States Courthouse
White Plains, N.Y.
September 19, 2019

Before: THE HONORABLE CATHY SEIBEL, District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
CELIA COHEN
Assistant United States Attorney

SUSAN WOLFE
Attorney for Defendant

THE DEPUTY CLERK: The Honorable Cathy Seibel presiding.

United States v. Jerry Augustine.

THE COURT: Good afternoon, Ms. Cohen and Ms. Wolfe and Mr. Augustine.

MS. COHEN: Good afternoon, your Honor.

MS. WOLFE: Good afternoon, your Honor.

THE DEFENDANT: Good afternoon.

THE COURT: Everyone can have a seat.

Let me start by putting on the record what I've received in connection with the sentencing so I can be sure I have everything.

I have the presentence report dated March 1st. I have Ms. Wolfe's September 5th letter regarding the career offender guideline. I have Ms. Wolfe's September 8th sentencing memorandum with attachments. And I have the government's September 11th letter.

Is that everything I should have?

MS. COHEN: Yes, it is, your Honor.

MS. WOLFE: Yes.

THE COURT: All right.

Mr. Augustine, have you read the presentence report?

THE DEFENDANT: Yes, ma'am.

THE COURT: Have you gone over it with your lawyer?

THE DEFENDANT: Yes, ma'am.

THE COURT: Ms. Wolfe, you've read the presentence report and gone over it with your client?

MS. WOLFE: Yes, I have.

THE COURT: I know we have guidelines issues to discuss, but do you have any objections to the factual material in the presentence report?

MS. WOLFE: No, your Honor. Objections that I had and prior counsel had were incorporated into the report and resolved.

THE COURT: All right.

Does the government have objections to the factual material in the presentence report?

MS. COHEN: No, your Honor.

THE COURT: Then the findings of fact in the presentence report are my findings of fact.

I have given some thought to the career offender guideline. Does anybody have anything they want to add on that subject that's not covered by the papers?

MS. COHEN: Not from the government, your Honor.

MS. WOLFE: I do, your Honor.

I've been steeped in pharmacology for the last couple days, and what I noticed is that the government's position is that naloxogel is a derivative of naloxone, which is excluded by the New York State schedules. And the actual language of the Public Health Law is that it criminalizes certain drugs and

their compounds, derivatives, salts, et cetera, excluding other drugs and their salts, and it excludes naloxone. And a salt is a salt. It is not a derivative. It is a substance that's added to a drug to increase absorption. It doesn't change the drug like calcium and calcium carbonate.

THE COURT: So you're saying that the statute includes all these drugs and their derivatives and then the exceptions only exclude certain things and their salts.

MS. WOLFE: Right.

THE COURT: Okay.

MS. WOLFE: I'm saying that because I -- you know, I printed out the Section 3306 to bring and forgot it, but that's what it says. And I can probably pull it up on my phone if your Honor wanted it.

THE COURT: I believe you.

So you're saying that the government can't rely on the argument that -- I want to make sure that I get the names right -- naloxegen -- that naloxegol is a derivative of naloxone because the statute that's carving out naloxone only carves out its salts, not its derivatives.

MS. WOLFE: Yes.

THE COURT: Okay. Well, the motion raises several interesting issues. One is whether the instant offense is a controlled substance offense under the meaning of the career offender guideline. Second is the issue we've just been

discussing, whether there's a difference between the federal and state controlled substances schedules that would render the defendant's prior conviction for criminal sale of a controlled substance third not a controlled substance offense. And third is whether the defendant's prior for attempted criminal sale of a controlled substance third is not a controlled substance offense because it's only the commentary rather than the guideline itself that includes inchoate offenses.

I don't really need to reach the first and third arguments, although I tend to think the government has the better of those, because I think the defendant has the better of the second. And I will start by saying that I think, without meaning any disrespect to the Second Circuit, that reasonable minds could differ on Townsend and I don't know why our elected representatives aren't doing something to fix what is, to my mind, a kind of ridiculous technicality. However, they haven't. It seems like all they have to do -- they could fix this easily, or the Commission could fix this easily, but whatever.

Given that we live in this world where Townsend is the law, I am persuaded by defendant's argument that this totally obscure compound, naloxogel, may be criminalized under New York law and is clearly not criminalized under federal law and, therefore, categorically, the one is broader than the other and, under Townsend, the state crime can't constitute a

controlled substance offense.

Is this silly? Yes. Is it the law? Yes.

It seems that even the government is not confident in coming out and saying New York law is clear. The government says New York law is not clear and, in that event, a tie goes to the defendant. But I think, based on what Ms. Wolfe just said and on the fact that at least the DEA, when it was excluding naloxogel, seemed to think that it otherwise would be included as a derivative of naloxone and because it's not specifically excluded under state law, the state law is broader.

Lucky Mr. Augustine the criminal sale of a controlled substance third degree doesn't count as a prior controlled substance offense and he's not a criminal offender. Lucky Mr. Augustine the government is not ripping up his plea agreement even though he got a lot of benefits out of it, including that the government didn't file a prior felony information and agreed to other stipulations.

So I'm not going to apply the career offender guideline, but even if I were applying it, it would only be a starting point. So I'm interested in whatever the parties want to add about what the sentence should be.

Does the government wish to be heard?

MS. COHEN: Briefly, your Honor. Thank you.

The fact that Mr. Augustine is not technically a

Exhibit I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 18 CR 895 (LAK)

ELLIUS RODRIGUEZ,

Defendant.

Sentence

----------x

New York, N.Y.
September 19, 2019
3:05 p.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
BY: ELINOR LYNN TARLOW
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(Case called)

THE DEPUTY CLERK: Government, are you ready?

MS. TARLOW: Yes. Good afternoon, your Honor. Elinor Tarlow for the government.

THE COURT: Ms. Tarlow.

THE DEPUTY CLERK: Defendants, are you ready?

MR. MARVINNY: Yes, your Honor. Federal Defenders of New York by Jonathan Marvinny and Daniel Habib for Ellius Rodriguez.

THE COURT: Good afternoon.

Mr. Marvinny, have you and your client had the presentence report for the necessary period?

MR. MARVINNY: Yes, your Honor.

THE COURT: Mr. Rodriguez, have you read the presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Did you discuss it fully with Mr. Marvinny?

THE DEFENDANT: Yes, sir.

THE COURT: All right. The presentence report will be sealed and made available to counsel in the event of an appeal.

I understand we have an outstanding guidelines issue.

MS. TARLOW: Yes, your Honor.

THE COURT: I will hear from counsel if they want to add to what they've written. I'll hear the government first.

MS. TARLOW: Your Honor, we essentially rest on our submission. Just as a general overview, if your Honor would like to hear with respect to our arguments, the defendant is, in the government's view, a career offender.

And the career offender enhancement is applicable to him, both because his instance offense qualifies as a controlled substance offense, as well as his prior 2017 conviction.

The instant offense, in the government's view, qualifies as a controlled substance offense, both based on the plain meaning of the guidelines, as well as the Second Circuit's interpretation of those guidelines which squarely forecloses, in the government's view, the defendant's position here.

With respect to the 2017 conviction, again, the government's view is that the New York state statute does not criminalize more conduct than its federal counterpart.

At the time of the defendant's conviction, the state drug schedule included a category of substances that included the particular substance at issue here, naloxegol.

There is no evidence that New York state at that time intended to prosecute naloxegol which was not explicitly named but fell within a category of substances that was already excluded.

THE COURT: Thank you.

Mr. Marvinny.

MR. MARVINNY: Your Honor, if it's okay with the Court, Mr. Habib would like to address the legal issues.

THE COURT: Okay.

MR. HABIB: Thank you, your Honor.

I'm happy to take guidance from the Court --

THE COURT: I'm sorry. You're happy to do what?

MR. HABIB: I'm happy to take guidance from the Court as to what the Court would be interested to hear about, but I would like to make a few brief points in reply to the government's submission.

First, with respect to the 846 conviction, the instant offense, as the Court is aware, two judges in this district, Judge Oetken and Judge Castel, have accepted the defense's position and ruled that 846 offenses are not controlled substance offenses for purposes of the career offender guideline.

THE COURT: What did they do in those decisions with *Jacobs*?

MR. HABIB: Yes. So, your Honor, in both of those cases, the government cited *Jackson*. And neither of those judges --

THE COURT: Thank you for correcting me.

MR. HABIB: Not at all.

THE COURT: Especially so tactfully.

MR. HABIB: Neither of those judges concluded that *Jackson* was binding. This is why: The precise legal question in *Jackson* was whether the Sentencing Commission has statutory authority to define a controlled substance offense for purposes of the career offender guideline to encompass conspiracy offenses.

I'm reading now from the first page of *Jackson* which states the question presented: "Whether the United States Sentencing Commission exceeded its statutory authority in treating a drug conspiracy conviction as a predicate for sentencing as a career offender."

The argument that we are making now accepts, for purposes of sentencing, that the Commission has authority to define controlled substance offenses -- for purposes of sentencing, we accept the holding of *Jackson* that the Commission has statutory authority to define controlled substance offense to include conspiracies. The question presented today is did they accomplish the objective of including 846 within that term by virtue of the application note that was promulgated.

We submit the answer to that question is no because the term "conspiring" in application note 1 must take a generic meaning, and the generic meaning requires an overt act, as 846 does not.

In addition, I would point out that the precise

question that we've presented here was not litigated in *Jackson* and, to my knowledge, has not been litigated in the Circuit or resulted in a published decision in the Circuit.

And the circuit has many times said that issues that lurk in the background but aren't contested and are not brought to the Court's attention are not to be regarded as having been decided so as to constitute precedence.

THE COURT: Let me ask you this: The presentence report says that without regard to career offender, the defendant would be in the criminal history category of IV.

Do you dispute that?

MR. HABIB: Actually, your Honor, I'm glad your Honor called that to our attention. Mr. Marvinny and I earlier caught that that's actually a mistake.

Mr. Rodriguez has six criminal history points which, absent the career offender designation, would place him in criminal history category III and would yield a guideline range of 46 to 57 months which would increase to 60 months by virtue of the mandatory minimum.

THE COURT: Let me just take a moment on that.

MR. HABIB: Sure.

THE COURT: What would the adjusted offense level be if you were correct?

MR. HABIB: Without the career offender enhancement, the adjusted offense level would be 21. In category III, the

range would be 46 to 57 months. But because there is a 60-month mandatory minimum, that would be the guideline range, 60 months.

THE COURT: Walk me through how you get to that.

MR. HABIB: Sure. So if your Honor wants to look at paragraph 23 of the PSR, we have a base offense level of 24 based on the drug quantity, minus three for acceptance of responsibility, 21. That's the offense level.

THE COURT: Okay. Thank you.

MR. HABIB: With respect to the New York offense, again, to my knowledge, two district judges in this Circuit have addressed this question.

As the Court is aware, Judge Caproni has accepted the argument that the New York offense of third-degree sale, as incorporated in a different provision of New York law but in substance third-degree sale, is not a controlled substance offense.

Judge Koeltl in a case not cited by the parties declined to resolve this question, instead resolving the issue on the basis of the timing question that's pointed out in footnote 7 of the government's submission. So the point is the only judge in this district who has actually opined on this question has gone our way, and that's Judge Caproni.

The argument, your Honor, is straightforward. Under *Townsend*, the term "controlled substance" in the guidelines

means federally controlled substances. In the New York statute encompasses any substance --

THE COURT: I'm sorry. Run that sentence past me again.

MR. HABIB: I'm sorry. The holding of the Circuit's decision in *Townsend* is that the term "controlled substance" in the guidelines in 4B1.2B means a federally controlled substance. So if the state offense criminalizes any substance that is not federally controlled, the state offense does not count as a career offender predicate.

So in *Townsend*, the state statute criminalized the sale of one substance and only one, HCG, which does not appear on the federal schedule. On that basis, *Townsend* held that the state offense did not qualify as a career offender predicate.

Our argument is a direct application of *Townsend*. Here, the New York statute criminalizes the sale of at least one substance, naloxegol, that is not a federally controlled substance.

We know this from the plain text of the New York statute, and I'm happy to tell the Court why. On page 6 of our sentencing submission, you'll find the relevant statutory language.

The New York definition of a narcotic drug includes -- and I'm paraphrasing. I'm including ellipses here -- opium and any derivative of opium. As a matter of chemistry, naloxegol

is a derivative of opium. Therefore, it's encompassed within the New York statutory language.

The corresponding federal regulation which appears on the same page just below the New York statutory language is the same, except it expressly excludes naloxegol.

It says opium ... and any ... derivative excluding naloxegol. On a plain statute-to-statute comparison, New York controls one substance that the federal government does not.

The government's position --

THE COURT: This is really sort of an exultation of form over substance if ever there was one, isn't it?

MR. HABIB: Your Honor, I think I've often encountered this question. And the answer is the Circuit resolved this issue -- the Circuit spoke to your Honor's question in *Geneaux* (phonetic), a case from 2017, when it said, the guideline calculation may be technical, but this court's required under *Gall* and under the sentencing statute to correctly calculate the guideline range.

If the Court wants to vary from the guideline range, the Court is free to do that based on all of the 3553(a) factors. But at this step, the Circuit has laid out the methodology in *Townsend*.

The methodology is we compare state schedule and federal schedule. If there is any daylight between the two, the holding of *Townsend* is the state offense cannot qualify as

a career offender predicate.

Just to address the government's point about naloxone, I think that, with respect, it's not an accurate reading of the New York statute. The New York statute excludes naloxone.

The government says that because naloxegol is a derivative of naloxone, it too is excluded. But that's simply not what the New York statute says.

And we know that the New York statute doesn't have that effect because prior to the amendment of the federal regulation in 2015, the federal regulation had exactly the same wording as the state regulation.

It says opium, any derivative of opium, excluding naloxone. But the DEA concluded that it was necessary to amend the federal regulation to explicitly exclude naloxegol because had it not done so, it would have been encompassed in the language any derivative of opium. So that's the DEA's judgment, that the language excluding naloxone does not also exclude naloxegol.

I would also take a step back here and say I take the Court's point that there is a domain where the rule of lenity applies. The Circuit said that a few weeks ago in *United States v. Parkins*.

In addition, a 1991 Circuit case, *United States v. Larenzo* said that the career offender guidelines definition of controlled substance is to be interpreted "strictly" because of

the dramatically enhanced penalties it yields. And the Court can see that here.

We're talking about a difference of 60 months as a noncareer offender and 188 to 235 as a career offender, so a more than threefold increase in the guideline range. For the government to prevail on this issue, it's not enough that they're right. They have to be unambiguously right.

We submit that in light of the plain text of the two statutes, the Circuit's holding in *Townsend* and Judge Caproni's reasoning in *Santana*, the government hasn't shown that its position is unambiguously correct.

THE COURT: Okay. Thank you.

Any final words, Ms. Tarlow?

MS. TARLOW: Yes, your Honor. With respect to the first argument regarding the 846 conviction, the government's position is that *Jackson* is clearly stating that it does qualify as a controlled substance offense.

To quote from the opinion: "Blackman challenges his sentence as a career offender on the grounds that a prior drug conspiracy conviction cannot be a predicate for career offender status. We find this argument to be without merit."

We have also quoted similar portions of that case for your Honor.

With respect to the New York offense --

THE COURT: But your adversary says that's just

lurking.

MS. TARLOW: Your Honor, we think it is controlling under Second Circuit law that your Honor should apply here.

With respect to the 2017 New York state offense, again, it's our position that based on the plain terms of the drug schedule, naloxegol is included because it is a derivative of a substance that is already excluded.

And it is true that after being petitioned by the drug sponsor, the DEA engaged in a rule-making process to explicitly list a new substance that had been developed but which was derived from a substance that had already been listed on the exclusion.

The government isn't aware of any evidence that New York state criminalizes conduct based on the substance which, as your Honor is aware, is a substance used for individuals who are constipated after taking opioids.

There is no evidence that this substance is one that would be prosecuted by the state. In fact, in the rule-making process, the DEA noted that based on several databases collecting both federal and state reports, there have been no seizures of this substance. And the defense has not cited to any case showing any evidence that the substance would be prosecuted.

As the government noted in its sentencing submission, the Second Circuit and Supreme Court have expressly cautioned

against courts attempting to use legal imagination to figure out when a state statute might be applied.

And here, there is no evidence that there is a realistic probability or even a theoretical probability that the state would criminalize conduct involving this substance.

So, your Honor, for those reasons, we would submit that both the instant offense and the 2017 conviction are controlled substances offenses under the guidelines.

THE COURT: Okay. Thank you.

MR. HABIB: Your Honor, I apologize. May I just say one sentence for my record?

THE COURT: One sentence.

MR. HABIB: The realistic probability inquiry in this case is satisfied by the language of the state statute under the Second Circuit's decision in *Hilton v. Sessions* which says that if the statute itself criminalizes the conduct, a case isn't necessary to demonstrate a realistic probability of prosecution. Thank you.

THE COURT: Thank you.

Now, a couple of other details before we go on.

Is there any forfeiture request here?

MS. TARLOW: No, your Honor.

THE COURT: I still haven't accepted the plea yet.

Mr. Rodriguez, I'm reading the transcript of the plea. I don't think the magistrate judge informed you of your right

to have counsel not only at trial but at every critical stage of the proceedings.

Do you understand that you would have such a right?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: Do you want to withdraw your plea in light of the fact that you weren't so advised earlier?

THE DEFENDANT: No.

THE COURT: Okay. I accept the plea.

I am persuaded by the government's argument with respect to the guidelines issues substantially for the reasons set forth in the government's letter and in Ms. Tarlow's argument. So I adopt the presentence report and the guideline computation and range it contains.

I think it is entirely possible as we go along here that this ruling may turn out not to be material to the sentence. But in the interests of good order, I make the ruling.

Okay. That said, let me advise everyone that I've received Mr. Marvinny's submission of September 5, the government's letter of September 16, the presentence report, and I believe nothing else in relation to the sentencing.

Is there anything I've omitted?

MS. TARLOW: Not from the government.

MR. MARVINNY: No, your Honor.

THE COURT: Okay. Fine. Then I will hear counsel for

the defendant.

MR. MARVINNY: Thank you, your Honor.

Notwithstanding the Court's ruling on the guidelines issues, we continue to request that the Court impose a sentence at the mandatory minimum of 60 months.

That is the sentence that the Court imposed on a codefendant in this case, Timothy Young, who we submit, your Honor, is essentially identically situated to Mr. Rodriguez, except for obviously the Court has now concluded that they have different guideline ranges.

Mr. Young was not a career offender, in part, because Mr. Young's two prior felony offenses included the criminal sale/conviction at issue in *U.S. v. Townsend* which was referenced earlier, but Mr. Young essentially had two prior felony drug convictions just like Mr. Rodriguez.

They are held responsible for the exact same quantities of drugs in the presentence report. And in fact, were Mr. Rodriguez not a career offender, his otherwise applicable guideline range would be lower than Mr. Young's.

As we set forth at the outset, his otherwise applicable range would be offense level 21, criminal history category III, which would be a guidelines range of 46 to 57 months.

So we don't think there is any reason, your Honor, any real, valid reason, to impose any kind of sentencing disparity

between Mr. Rodriguez and Mr. Young.

In addition, your Honor --

THE COURT: Was Mr. Young involved in coordinating drug sales from a jail cell?

MR. MARVINNY: I believe he was, your Honor. If he was not involved in coordinating drug sales, he was nevertheless intimately involved in the ongoing conspiracy.

The government in their submission in opposition to Mr. Young stated -- and I quote -- "Even once he was incarcerated in June 2018, he continued to discuss the instant narcotics conspiracy and its operation while serving his term of imprisonment on his two prior felony convictions.

So he remained involved, your Honor. I'm not here to bag on Mr. Young. Mr. Young had his equities. I know, your Honor, he continued to receive money, some of the profits, from the drug conspiracy that was sent to him while he was on Rikers Island.

He was out for at least some portion of the charged conspiracy, albeit not a terribly long period. But for some period, he was out before he went into Rikers Island. And he continued to have detailed discussions with the coconspirators, including Mr. Rodriguez and Ms. Patterson. There is certainly no evidence that he intended to leave the conspiracy behind once he was released from Rikers Island.

So I don't think Mr. Young should be rewarded that he

went to prison and was unable to actually conduct the hand-to-hand sales during that short period of time. So, again, the weights that they are assigned in the PSR are identical. Neither of them had a leadership role vis-à-vis the other.

So, again, your Honor, while I'm not here to denounce Mr. Young, I'm here to say that there is no real reason why Mr. Rodriguez should get any longer sentence, certainly not a significantly longer sentence.

The probation office, as your Honor knows, recommended 78 months. That recommendation was based, at least in part, on a misapprehension of the otherwise applicable guidelines range which they believed was topped off at 71 months.

I think it's fair to conclude that if they had believed that the otherwise applicable range was in fact 60 months as it is, they might have had an even lower sentencing recommendation. But certainly the probation office recognized that a sentence nowhere near the career offender range was appropriate for Mr. Rodriguez.

Your Honor, Mr. Rodriguez served on his two prior felony drug offenses one year and six months respectively. And so we say this in our submission. Even a five-year sentence here would be five times longer than any previous prison term he served and would certainly satisfy the principle of incremental punishment and would certainly be a lengthy

sentence when compared to Mr. Rodriguez's prior offenses.

And that matters for several reasons: It matters because, again, the simple fact is it is an exponentially longer sentencing than he's ever served, and it matters for the deterrent effect that it will have on Mr. Rodriguez.

We talk a lot in our submission about how his federal case has been a wake-up call, and it really has been, your Honor. Mr. Rodriguez wrote a letter to the Court. Not one word was edited by counsel. Not one word was suggested by counsel.

I think that letter demonstrates his intelligence and his developing emotional maturity. What I think is most significant about that letter, your Honor, is Mr. Rodriguez articulated that he understands the real harm he was causing to his community by selling drugs.

This isn't someone who is simply upset that he got caught. This is someone who has come to realize that the conduct he was engaging in was harmful, both to him and to his community. And so I think his letter speaks volumes about his capability to turn his life around upon his release from federal prison.

Mr. Rodriguez is not going to be eligible for any of the additional reductions that came about because of the First Step Act that other defendants in his situation might be eligible for. That's because his offense involved fentanyl,

and the First Step Act precludes additional sentencing reductions in cases involving fentanyl. So Mr. Rodriguez is likely to serve 85/86 percent of his sentence.

Although I will say we have asked your Honor to recommend the RDAP program, which if he were to successfully complete, might result in some additional time off.

But a five-year sentence is a lengthy one, and it's a serious one, your Honor. Mr. Rodriguez is remorseful. He knows what he did was wrong. He has a three-year-old daughter at home that he is missing out on watching her grow up. It's his own fault. It's his own actions that resulted from that, but it is nevertheless something that is tearing him apart.

I could go on, your Honor, but for all of the reasons, most significantly because a codefendant, who for all practical purposes who is identically situated got 60 months, Mr. Rodriguez should get that sentence as well, your Honor.

THE COURT: Thank you.

Mr. Rodriguez, you have the right to speak.

Is there anything you want to say?

THE DEFENDANT: Yes. Can I please stand?

THE COURT: Yes. Sure.

THE DEFENDANT: I would like to first apologize to you, your Honor, for even wasting your time with this case, although it is a very serious case, and I really do understand -- I tell you this from my mouth to your ears. I

understand the role and the harm that I've caused other peoples' families, society, and my community.

This case and this charge and this whole situation is a wake-up call. You can give me 188. You can give me 60. Whatever you give me, I understand, and I'm up. I'm awake. I know what I did was wrong.

I'm not making any excuses, and it is tearing me apart that I'm not going to be part of my daughter's life, but I do accept the fact that I took that risk and I took that responsibility. I have to accept that, that I took that risk and I took that chance and I messed that up. And I accept that.

And I just want you to know that I'm sorry to you; to my community; and most of all, my family and my child's mother for leaving you alone to take care of our daughter by yourself.

Like I say, I'm remorseful, and I'm just sorry. I accept whatever you give me, period, that's it. Thank you, your Honor.

THE COURT: Thank you.

Ms. Tarlow.

MS. TARLOW: Yes, your Honor. First we acknowledge, of course, the defendant's family circumstances, the fact that he has a young child, his own age. We don't have too much more to say other than what's set forth in our submissions.

I won't belabor the point, just to note for your Honor

that this is an incredibly serious offense. It involved a very dangerous substance, fentanyl, and a significant quantity.

THE COURT: Do you have any evidence that he knew there was fentanyl or anything that was that dangerous in the material?

MS. TARLOW: Your Honor, not necessarily specifically fentanyl. But as we noted in our submission, the defendant in his conversations with the undercover officer actually bragged about the substance he was selling and described it as "some death" to reflect --

THE COURT: Excuse me. Sudden death?

MS. TARLOW: "Some death," your Honor, to describe the potency, as if that were an attractive feature of just how strong those drugs were.

THE COURT: Not literally; right?

MS. TARLOW: Your Honor, it is our understanding that it was intended to refer to the literal strength, and that is a way in which certain drugs are actually marketed is the fact that they are incredibly strong. So that is a selling point to some individuals who purchase the drugs is that those drugs are stronger than other drugs.

THE COURT: Sure. But that doesn't necessarily mean -- and indeed it would not be a thing of marketing value if it alluded to death in the normal sense.

MS. TARLOW: To actual death, yes, your Honor. But it

is our position that it --

THE COURT: Only a certain limited subset of the population.

MS. TARLOW: Yes, your Honor. It still is our position that it refers to the relative strength and that it shows that the defendant was aware that these were particularly strong drugs.

That's also further evidenced by the fact that we have recordings and other evidence that demonstrate that the defendant was aware that a particular individual overdosed on the substances that were provided to them; that the defendant himself engaged in a transaction to a particular victim who overdosed on those substances outside of his home.

And we know that, at least in part, from this jail call recording in which Mr. Rodriguez's codefendant discussed that occurring and discussed the fact that Mr. Rodriguez had provided that information, had communicated that an individual had overdosed after a transaction.

Your Honor, the defendant, Mr. Rodriguez, continued to sell those substances to the undercover officers in this case after an individual overdosed. So we would submit that based on all of those facts, he was aware of the potency of the drugs that he was selling and he continued to distribute them.

THE COURT: Okay.

Anything else?

MS. TARLOW: Your Honor, just briefly with respect to his criminal history, as we outlined in our submission, the defendant does seem to have a repeated criminal history of selling drugs, including heroin. So that gives the government some concern that a significant sentence is necessary in order to deter the defendant from returning to this similar conduct.

THE COURT: Okay. Thank you.

Mr. Rodriguez, please stand for the imposition of sentence.

It is the judgment of this Court that you be committed to the custody of the Attorney General of the United States or his designee for a term of imprisonment of 78 months, that you thereafter serve a term of supervised release of four years, and that you pay the mandatory special assessment of $100.

The term of supervised release shall be subject to the mandatory and the standard conditions of supervision 1 through 12 in addition to the following special conditions:

First, you shall participate in an outpatient substance abuse program approved by the U.S. Probation Office which may include testing to determine whether you have reverted to using drugs or alcohol.

I authorize the release of available drug treatment evaluations and reports to the substance abuse treatment provider as approved by the probation officer.

Second, you shall submit your person, vehicle, and

premises under your control to a search at a reasonable time and in a reasonable manner on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of your release may be found.

The mandatory drug testing condition is suspended. I find that the conditions of supervised release contemplate drug testing and that the mandatory drug testing condition isn't necessary.

Now, this is a sentence substantially below the guideline range, given my ruling. It is a sentence above the top of the bottom of the guideline range if my ruling were incorrect on career offender. It's a difficult case. I think the ruling ultimately though is not material. I would impose the same sentence with or without the career offender enhancement.

First of all, there is considerable, if not perfect, comparability between the defendant's behavior and Mr. Young. So something well below the career offender guidelines range is supported by the need to avoid unwarranted disparities.

Secondly, I take into account Mr. Rodriguez's family circumstances. He has a young child at home who he seems to be devoted to, at least I hope that he is.

Thirdly, I think, given the defendant's record, the 188- to 235-month guideline range is simply higher than it needs to be in order to accomplish the purposes of the

Sentencing Reform Act. I think the sentence is about in the right place with or without that career offender adjustment, and I've done my best to accomplish that.

I advise you, Mr. Rodriguez, that to whatever extent you haven't waived it, you have the right to appeal from the judgment imposed in this sentence.

If you wish to appeal, you must file a written notice of appeal with the clerk of the district court no later than 14 days after judgment is entered which could conceivably be as early as today.

In the event you wish to appeal and you can't afford to pay the fees necessary to do so, you have the right to apply for permission to appeal as a poor person. If that application were granted, you would be permitted to appeal without payment of the fees. And if you can't afford a lawyer, a lawyer would be appointed for you at government expense.

You may be seated.

Anything else, folks?

MS. TARLOW: Your Honor, in an abundance of caution, the government moves to dismiss any open counts.

THE COURT: Granted.

MR. MARVINNY: Your Honor, two requests, please. Mr. Rodriguez has asked that your Honor recommend the residential drug abuse prevention program, the RDAP program, within the Bureau of Prisons.

THE COURT: Did I do so in the *Young* case?

MR. MARVINNY: You did.

THE COURT: So recommended.

MR. MARVINNY: Thank you.

Second, your Honor, Mr. Rodriguez has asked that you recommend that he be designated as close to New York City or New Jersey as possible to facilitate family visits. His family lives in Staten Island. So those two locations are easiest.

THE COURT: So recommended.

I hope you got the message this time, Mr. Rodriguez. You're well on your way to wrecking your life. And if you don't turn it around, that's what's going to happen because you'll be back if you don't. So I wish you success in turning it around.

Okay, folks.

(Adjourned)

Exhibit J

IbjWferS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 17 Cr. 773 (JGK)

GREGORY FERRER,

Defendant. Sentence

----------x

New York, N.Y.
November 16, 2018
2:30 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

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BY: MARTIN S. COHEN
DANIEL G. HABIB
Assistant Federal Defenders

(Case called)

THE COURT: Good afternoon, all. Please be seated.

MS. QIAN: Good afternoon, your Honor. Ni Qian and Cecilia Vogel, for the government.

MR. COHEN: Good afternoon, your Honor.

THE COURT: I'm sorry. I thought Ms. Vogel would note her appearance.

MS. VOGEL: Oh. Ms. Qian did note my appearance for me. Thank you, your Honor.

THE COURT: OK.

MR. COHEN: Good afternoon, your Honor. Martin Cohen and Daniel Habib, from the Federal Defenders, on behalf of Gregory Ferrer.

THE COURT: Good afternoon. I note that the defendant is present.

I've received the presentence report prepared May 7, 2018, revised June 5, 2018, together with the sentencing recommendation and the addendum. I've received the defense submissions, dated September 17, October 5, October 16, and another one on October 16. I've received government submissions dated October 11 and October 17, 2018.

I'll listen to all of the parties, as I regularly do, checking to make sure that they've reviewed the presentence report, the recommendation and the addendum, and that defense counsel has discussed them with the defendant.

Before I do that, because there has been briefing and argument over the correct application of the guidelines in this case, I'm going to begin with an explanation of my conclusions with respect to the guidelines sentencing range. It certainly doesn't prevent the parties from raising any issues with respect to that, after I've explained my conclusions. And of course, even after I've determined the appropriate guidelines sentencing range, I'm going to listen to all of the parties before I determine what the appropriate sentence is in the case, because the guidelines sentencing range is only a starting point for a determination of the appropriate sentence in the case.

There is a dispute between the parties as to the proper calculation of the guidelines sentencing range. The government contends that the base offense level is 24, under guideline Section 2K2.1(a)(2) and 4B1.2(b) of the current guidelines because the defendant committed the current offense subsequent to sustaining at least two felony convictions of a "controlled substance offense."

I should note that the current version of the guidelines should be used, which is the November 2018 version, unless there is an *ex post facto* problem. The parties have not suggested that there is any difference among the possible versions of the guidelines on the relevant issues.

The government points to at least two New York State

felony convictions in 2008 as felony convictions of a "controlled substance offense," two counts of criminal sale of a controlled substance on school grounds and one conviction for third degree sale of a controlled substance, presentence report paragraphs 32, 33 and 35. The government, therefore, agrees with the presentence report that the total offense level is 21, after subtracting three levels for acceptance of responsibility, the criminal history category is 6 and the guidelines sentencing range is 77 to 96 months.

The defendant contends that offense level 24 is not warranted because the defendant's prior convictions under New York State law are not "controlled substance offenses" under the categorical approach to the definition of "controlled substance offense," and therefore, the appropriate guideline is 14, under 2K2.1(a)(6), and after a two-level credit for acceptance of responsibility, the offense level is 12, the criminal history category is VI and the guidelines sentencing range is 30 to 37 months.

The parties agree that the Court should look to the definition of a controlled substance offense under New York State law in 2008, the time of conviction, but the agreement ends there. The defendant says that the Court should determine whether the definition of controlled substance offense under New York State law in 2008 is broader than the definition of a controlled substance offense under federal law today. Because

New York State law, in 2008, covered three substances -- geometric isomers of 3-methylfentanyl, naloxegol and naldemedine -- that are not covered by the federal Controlled Substance Act today, the defendant argues that the state law is broader than the federal law, and therefore, a conviction for those offenses under state law is not a controlled substance offense under the controlling federal statute.

The government argues that the state and federal statutes must be compared at the time of conviction for the state law offense, and in 2008, all three of the substances relied on by the government -- I'm sorry. Let me say that again.

The government argues that the state and federal statutes must be compared at the time of conviction for the state law offense, and in 2008, all three of the substances relied on by the defendant were, in fact, controlled under federal law. The government argues, therefore, that the state law was no broader than the federal law, and therefore, the state law convictions qualified as controlled substance offenses under the guidelines.

In *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018), the Second Circuit Court of Appeals instructed that the categorical approach is employed when determining whether the defendant has committed prior controlled substance offenses, as defined in Section 4B1.2(b) of the federal sentencing

guidelines for purposes of setting a base offense level under guideline 2K2.1A. Thus, under *Townsend*, the Court is to compare New York State's definition of "narcotic drug" with the federal definition of "controlled substance," set out in the Controlled Substances Act. If the New York State definition is broader than the federal definition -- that is, if the New York State definition contains substances that the federal definition does not -- then the state statutes of conviction do not match the federal crimes, and guidelines Section 2K2.1(a)(2) cannot apply.

In *Townsend*, the court looked to the New York State statute at the time of conviction and found that it was broader than the federal statute because it covered HCG, a substance not covered by the federal Controlled Substances Act. Therefore, a violation of the state statute did not qualify as a "controlled substance offense" under the federal sentencing guidelines. However, while *Townsend* looked at the state statute at the time of conviction, the court did not attempt to explain whether there was any relevant difference in the federal statute at the time of conviction for the controlled substance offense and at the time of sentencing for the federal offense. That is the matching issue that is raised in this case.

The parties agree that the state and federal definitions matched in 2008, when Mr. Ferrer was convicted of

the state offenses, but the defendant points out that now, at the time of Mr. Ferrer's sentencing, the New York State definition contains three substances not in the federal definition and, thus, is broader than the federal definition. Whether Section 2K2.1(a)(2) applies to Mr. Ferrer, therefore, depends on whether the state definition of a "narcotic drug" is matched against the version of the federal statute that existed at the time of conviction for the state offense, or whether it must be matched against the current version of the federal statute.

The defendant argues that because 18 U.S.C. Section 3553(a)(4)(A)(ii) and guideline 1B1.11(a) direct the Court to apply the version of the guidelines manual in effect at the time the defendant is sentenced, the Court must use the current federal definition of controlled substance offense to see if it matches the definition of "narcotic drug" that existed in New York State law in 2008. But there is nothing in the statute or the guidelines that supports the defendant's argument.

The current version of the guidelines is being used, and it provides for an offense level of 24 if the defendant is convicted of being a felon in possession of a firearm after having previously been convicted of two controlled substance offenses. There is nothing in the guidelines that suggests that the Court should look at the New York State statute at the time of the prior convictions and match it against the federal

definition of controlled substances offenses. Indeed, the defendant's argument is inconsistent, because *Townsend* requires the Court to look back at the New York State law at the time of the prior controlled substance offense convictions, and there is no explanation why the guidelines require the Court to look back to the time of the prior convictions for the definition of a narcotic offense under the state law and ignore the federal law at the time to which it is being matched.

There is no case directly on point that is cited by the parties. The prior cases from the Court of Appeals, such as *Pascual v. Holder*, 707 F.3d 403, 405 (2d Cir. 2013), found that violations of the New York State statutes were controlled substance offenses, but they did not deal with this specific matching issue. The closest case, and one which is persuasive, is *Doe v. Sessions*, 886 F.3d 203 (2d Cir. 2018). In that case, the Second Circuit Court of Appeals held that for purposes of determining whether a prior federal conviction was a controlled substance offense that required removal under the Immigration and Nationality Act, courts must look to the version of the Controlled Substances Act in effect at the time of the defendant's conviction.

In that case, the petitioner argued that in employing the categorical approach, the court should determine whether the offense of conviction matched the violation of the Controlled Substances Act at the time of removal. Because the

Controlled Substances Act at the time of conviction covered naloxegol, which was no longer covered by the Controlled Substances Act at the time of removal, the petitioner argued that the statute was broader at the time of conviction and therefore was not a controlled offense at the time of removal. In other words, the petitioner was arguing for the same mismatch advocated by the defendant here.

The Court of Appeals rejected that proposition. As the court explained, "in employing the categorical approach to determine whether state drug offenses constitute felonies punishable under the Controlled Substances Act, the Supreme Court, this court, and the BIA had previously assumed that an alien's removability depends on whether a state drug schedule sweeps more broadly than the Controlled Substances Act schedules in force at the time of the alien's conviction, and not at the time that his removal proceedings are initiated." *Id.* at 208. There is no reason why this holding should not be applied in this case. Substances are constantly added and removed from the Controlled Substances Act. When guidelines Section 2K2.1(a)(2) applies to the defendant should not be based on the fortuity of when the defendant is sentenced.

Moreover, applying the version of the state and federal drug definitions in effect at the time of conviction for the underlying state offense allows both the government and the defendant to anticipate the sentencing consequences

attached to a conviction. While the defendant points out that *Doe* is an immigration case and not an interpretation of the guidelines, the categorical approach that was at issue in *Doe* is the same categorical approach that is used across cases dealing with immigration, the criminal code and the guidelines. *Doe* and *Townsend* indicate that the Court must apply the New York State definition of narcotic drug and the analogous federal definition in the Controlled Substances Act in effect at the time of Mr. Ferrer's 2008 convictions.

The parties do not dispute that these definitions are a categorical match at that time. Because the New York State definition does not sweep more broadly than the federal definition, the base offense level is 24, set out in Section 2K2.1(a)(2) of the guidelines, and applies to Mr. Ferrer. Therefore, the offense level is 21, after a three-level reduction for acceptance of responsibility, the criminal history category is VI and the guidelines sentencing range is 77 to 96 months.

All right.

Yes, Mr. Cohen.

MR. COHEN: Could I just have one moment, your Honor?

THE COURT: Sure.

MR. COHEN: Thank you, your Honor.

I just want to reiterate our objection as set forth in our prior briefings and argument. Thank you.

THE COURT: I'm sorry. Your prior briefing and?

MR. COHEN: And the argument from last month to preserve it.

THE COURT: Oh, sure.

MR. COHEN: Thank you, your Honor.

THE COURT: Moving on to the next step, as I said, Mr. Cohen, have you reviewed the presentence report, the recommendation and the addendum and discussed them with defendant?

MR. COHEN: I have, your Honor. We reviewed the report with Mr. Ferrer. We have no objections.

THE COURT: No.

MR. COHEN: Sorry.

THE COURT: My next question is other than the objection which you've already noted, do you have any objections?

MR. COHEN: No, your Honor.

THE COURT: OK. Now I'll listen to you for anything that you would like to tell me in connection with sentence, any statement you'd like to make on behalf of the defendant, anything at all you would like to tell me.

MR. COHEN: Thank you very much, your Honor.

I wanted to start by letting the Court know that Mr. Ferrer's mother, Rosita Ferrer, is here today. She's been at every court appearance and has written to the Court and is

here to show her support. It's also emblematic of the support Mr. Ferrer has from his family and will have when he is released.

Nothing in my remarks today, your Honor, or in any of our submissions should be taken by the Court as an argument that possessing a gun after having a prior felony conviction is not a serious offense, regardless of whether the gun was loaded or not. In this case, it was unloaded, and I can represent to the Court there's nothing in our papers about it, but there's a videotape of Mr. Ferrer at the time, for the 15 minutes or so before he was arrested and after, and there's nothing in his conduct, beyond the fact that he had a gun in his pocket, that suggests that he was doing anything or had any intention of doing anything beyond standing outside of a store.

But regardless of the seriousness of the offense and Mr. Ferrer's significant prior criminal history, 30 months is sufficient in this case, for reasons that I've described in my submission and I will argue this afternoon.

As we described in our letter to the Court, Mr. Ferrer grew up in a very difficult neighborhood. His father was absent from his life. His mother, Mrs. Ferrer, worked to support everyone, and so she wasn't around that much. She's worked for the last, I think, 30 years for the city.

Your Honor, I don't want to belabor the point too much, but there is an element that the Court should consider in

terms of our societal failure in connection with Mr. Ferrer and other folks. I've been doing this for ten years, and I've done a significant number of sentences for people who are charged with possessing a gun after having a prior felony conviction, and I know the Court has sentenced many of those, not just mine, but other folks' for that offense. The sad fact is that if you look back at all of my sentencing submissions, as I have, and you look at the biographical data for the folks who are before the Court for that offense, they are depressingly similar. They are largely African-American young men, growing up in very rough neighborhoods, whose fathers are not around. There were very few opportunities for folks like Mr. Ferrer when he was growing up. The schools that they attended were not well-set up to attend to their needs, and when they got involved in the criminal justice system, the criminal justice system wasn't there for them either.

Mr. Ferrer, like many other folks, ended up spending some time at Rikers Island. The U.S. Attorney's Office in the Southern District of New York joined a lawsuit against Rikers Island, deploring the conditions there, the heavy use of solitary confinement, the violence that's inherent there, and it does nothing -- the way Mr. Ferrer and others were treated -- to help them with settling into society and moving forward.

It doesn't mean, of course, that Mr. Ferrer isn't

responsible for his conduct or his prior offenses of being before the Court, but there is some element that the Court should consider in terms of this vast failure on our part, society's part, to help Mr. Ferrer and other folks like him, and whether our response at this point, when Mr. Ferrer is 30 and back here before the Court, is a very extensive term of incarceration for this offense, and whether there's an alternative here that the Court should endorse, which is a significant sentence; 30 months in prison is not insignificant. It's longer than the longest sentence Mr. Ferrer has ever served before, but it would allow Mr. Ferrer to come out in a reasonable amount of time so that he can move forward with his life.

We've described for the Court Mr. Ferrer's family now. The Court has letters from his mom and from his sister, describing what Mr. Ferrer was doing in the year before this arrest: that he had stopped being involved in selling drugs; that he had participated in a vocational program, the CEO program, which he completed; that he got his OSHA certificate; that he found work as a dishwasher; that he was an important figure for his nephew; that he loves animals, cares for, has a lot to teach his nephew and help him as he grows further.

And now, in addition to that, after the last year that Mr. Ferrer's been in the MCC, he's been working with our office to develop a plan for when he comes out. We provided that to

the Court. He's intent on picking up where he left off and going back to work. The program that we have identified will provide him with housing and vocational services, and we're urging the Court not to delay that reentry by anything close to the extensive guidelines that are called for under the guidelines, as the Court has found them.

Two and a half years in a federal prison is a very significant sentence. We described for the Court what Mr. Ferrer's individual experience has been like at the MCC. There are mice, bugs, overcrowdedness -- if that's a word -- very few positive programs. Mr. Ferrer had to wait nine months or so before he could start working, and now he's working in the kitchen. It's good that he's working, but there, as in when he's designated if he's lucky enough to get a job, he gets paid 12 cents an hour. That equates to $19.20 a month for 160 hours of work.

The Court can and should take into account the punitive nature of confinement these days in the BOP. The government, when it advocates for a guidelines-range sentence of whatever length it is, never alters its position based on the facilities or the state of confinement. But as the Court well knows, positive programming, rehabilitative programming, assisting with reentry in the future are not hallmarks of federal custody these days. The Department of Justice's priority is on incarcerating and not on rehabilitating folks.

Maybe that will change a little bit in the future, but it's hard to see it changing a lot for someone like Mr. Ferrer, because, for example, in the bill that is circulating through Congress, the positive effects are probably not going to be ones that Mr. Ferrer can benefit from because of the nature of this offense.

Mr. Ferrer, as we described in our papers, needs mental health treatment. He won't get effective mental health treatment in the federal Bureau of Prisons. What will happen is, if the Court sentences him to 30 months or something close, Mr. Ferrer will get out; he'll be 32 or 33 years old, and he'll have his family waiting for him and folks in our office ready to help him and programs that are set up for him. And if the Court imposes a much more extensive sentence, then everything is going to be much more difficult. And the benefits of it are abstract and hard to see past a certain point, because at some point -- in our view, 30 months at that point -- there's going to be sufficient punishment with a correlative sufficient deterrence. Mr. Ferrer does not need to be incapacitated for a longer period than that. The Court needs to provide effective rehabilitative services, and he's not going to get them while he's incarcerated.

Mr. Ferrer has a significant criminal history, but as we've described in our submission, 11 of those criminal history points are all for concurrent sentences that were imposed in

2008, which suggests that the purpose of increasing someone's sentence for recidivism is, in part, that they've received a sentence and it hasn't deterred them and they've receive another sentence. That purpose is lessened when the sentences are concurrent. And in the end, the Court is sentencing him for this offense. Yes, having a firearm is a serious offense, but Mr. Ferrer, again, had an unloaded gun. He was not doing anything with it. That offense does not require a sentence in the range of the guidelines as calculated by the Court.

And just for a moment to talk about the guidelines, your Honor, the Court found that the guidelines were an offense level of 24.

THE COURT: 21, after --

MR. COHEN: I'm sorry. Base offense level of 24. We would argue that the base offense level is 14, based on the categorical approach and how that should be implemented.

As the Court said when we were here a month ago, they're somewhat artificial calculations. I think the Court's term was "theory upon theory," the point being that were the guidelines 30 to 37 months, as we had argued, for the same Gregory Ferrer, with his same exact criminal history and same contact background, the government would have argued that the appropriate sentence is 30 to 37 months. You can confirm that with the government, but I spoke to Adam Hobson this morning, the assistant on the case, and I asked him what his position

would be if the Court came down on our side. And while he didn't say what his position would be in terms of what the argument would be, saying that there would be another assistant there, what he did say was that if the guidelines had been 30 to 37 months, this is not a case where the government would have taken the steps to ask for an above-guidelines sentence. They do that rarely. They need to go to their supervisors in order to do that, and it's usually based on some aggravating factor within the offense itself. So with the same background, the same offenses, if the guideline calculation had been 30 to 37 months, that would have been sufficient for the government.

THE COURT: I don't determine sentences based upon what is sufficient for the government.

MR. COHEN: I understand that, your Honor, but the point is that the guidelines often have, certainly for the government and less so for courts, a very strong gravitational pull.

Here, we're dealing with a very specific and unique individual, and I want to urge the Court to not let the gravitational pull of the guidelines in this case move it to impose a sentence that is extensive or more extensive than the one that we've requested.

I've spent a lot of time with Mr. Ferrer. He's had a tough life. He's made some very serious mistakes. As he wrote to the Court, his most serious one is picking up this gun and

putting it in his pocket and throwing away the progress that he'd made or was starting to make. But that should not have him incarcerated for a very extensive period of time.

I urge the Court to impose a sentence of 30 months, which will be sufficient to satisfy all the purposes of sentencing in this case.

Thank you.

THE COURT: All right.

Mr. Ferrer, have you reviewed the presentence report, the recommendation and the addendum, and discussed them with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Other than your lawyer has already said, do you have any objections?

THE DEFENDANT: No.

THE COURT: I'll listen to you for anything that you would like to tell me in connection with sentence, any statement you'd like to make, anything at all you'd like to tell me.

THE DEFENDANT: I would like to say, your Honor, that I would like to apologize for the possession of firearm. I'm not the same person that I was last year. I made changes in my life. I joined programs in MCC to better myself. I just regret, basically, the day I possessed the firearm, and I know that it was a foolish thing to do, to walk around with a

firearm, and I just want to say I apologize.

I want to also apologize to my mother, because I let you down once again, and I know you wouldn't be here, you'd be at work and you got to be here to show me some support. And I'm basically ready to better myself when I get released and not come back to this place.

That's about it.

THE COURT: OK. Thank you, Mr. Ferrer.

THE DEFENDANT: You're welcome.

THE COURT: Has the government reviewed the presentence report, the recommendation, and the addendum?

MS. QIAN: Yes, your Honor.

THE COURT: Does the government have any objections?

MS. QIAN: No, your Honor.

THE COURT: I'll listen to you for anything you would like to tell me in connection with sentence.

MS. QIAN: Your Honor, the government wishes --

THE COURT: Could you keep your voice up.

MS. QIAN: Yes.

Your Honor, the government wishes to rest on its submissions.

THE COURT: I can't hear you. I really can't.

MS. QIAN: I apologize for that, your Honor.

The government wishes to rest on its submissions.

THE COURT: OK.

MS. QIAN: Thank you.

THE COURT: I'll place the presentence report, the recommendation and the addendum in the record under seal. I'll place the parties' submissions to me also in the record under seal. The parties should assure that their submissions are in the record not under seal after making sure they redact any personal identifying information.

I adopt the findings of fact in the presentence report. I've already given my analysis of the guidelines, but as I've already said, I conclude that under the current guidelines, the total offense level is 21. The criminal history category is VI and the guidelines sentencing range is 77 to 96 months.

I appreciate that the guidelines are only advisory and that the Court must consider the various sentencing factors in 18 U.S.C. Section 3553(a) and impose a sentence that is sufficient, but no greater than necessary, to comply with the purposes set forth in Section 3553(a)(2).

Before I go through the sentencing analysis, the defense has made a point of the fact that the defendant's mother is in the courtroom, and that certainly shows support for the defendant. Defense also makes the argument that the defendant has had a difficult upbringing. I want to make it clear at the outset that there is nothing in the submissions before me from which the defendant's mother should take away

any sense of personal responsibility. What people do with their lives are personal choices. It's plain that the defendant's mother has worked extraordinarily hard over the years and is very supportive of the defendant, and the defendant's mother should take some comfort in that and certainly not take away from this process any sense of failed personal responsibility. People make their own choices and lead their own lives, and it's plain that the defendant's mother has tried extremely hard to support the defendant, as the defendant himself said.

So we turn to the factors.

The offense is plainly serious, the possession of a firearm by a convicted felon. Moreover, the defendant has a substantial criminal history. He is in category VI, the highest category.

There are some mitigating factors. The criminal history category plainly overstates the seriousness of the defendant's criminal history. The criminal history category is the largest for any defendant, but the individual offenses that constitute that category in this case don't come close to placing the defendant in that category of defendants who could be considered the most serious, most dangerous defendants who come before the Court. Eleven points of the criminal history category are attributable to four convictions for which the defendant was sentenced on the same day ten years ago and for

which the defendant received a maximum sentence of two years' imprisonment. But it appears from the presentence report that the defendant appears to have been released on parole after a year and a half.

The defendant was never sentenced to more than two years' imprisonment, although the defendant is in the highest criminal history category. As a consequence, a substantial sentence, although less than the guideline sentencing range, together with a term of supervised release should accomplish the goals of deterrence and protection of the public as well as recognize the seriousness of the offense.

On balance, in this case, the Court intends to impose a sentence of 30 months on Count One to be followed by a three-year term of supervised release with the standard conditions of supervised release in this district and those recommended by the probation department.

The Court will also impose a condition of mental health treatment.

The Court will not impose a fine because the defendant lacks the ability to pay a fine, after taking into account the presentence report.

The Court will not impose restitution because there is no victim under 18 U.S.C. Section 3663.

The Court will impose a $100 special assessment.

The sentence is consistent with the factors in Section

3553(a) and is sufficient, but no greater than necessary, to comply with the purposes of Section 3553(a)(2).

I've explained the reasons for the sentence.

Before I actually impose the sentence, I'll recognize defense counsel for any statement.

MR. COHEN: Thank you very much, your Honor.

I just want to briefly say that I very much appreciate the Court's comments about Mr. Ferrer's mother and wanted to make clear that nothing in my description of his background was meant to suggest in any way that she hasn't done a fantastic job trying to help and support Mr. Ferrer, and I expect will continue to do so when he's released.

Thank you.

THE COURT: Before I actually impose the sentence, I'll recognize you, Mr. Ferrer, for anything you would like to tell me.

THE DEFENDANT: I would like to say thank you for your decision, and I also would like to say thank you to Mr. Cohen, thank you to Mr. Dante and thank you to Mrs. Veasley and thank you to my new lawyer.

THE COURT: All right.

Mr. Ferrer, please remember, when you're on supervised release, any violations of supervised release come back to me, and I have a very long memory. You say you've changed. The conditions of supervised release are strict with respect to not

violating any federal, state or local laws, remaining drug free. If you violate any of those provisions, you're back before me, and as I told you at the time that I took your plea, if you violate the conditions of your supervised release, you can be sentenced to prison for the term of your supervised release without any credit for any time you had already spent on supervised release, so a violation of supervised release can have serious consequences for you.

OK. Before I actually impose the sentence, I'll recognize the government for anything the government wishes to tell me.

MS. QIAN: Nothing further, your Honor.

THE COURT: All right.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that the defendant, Gregory Ferrer, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 30 months on Count One.

I recommend incarceration in the New York City area so that defendant can be close to his family.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

While on supervised release, the defendant shall comply with the standard conditions of supervised release in this district.

The defendant shall not commit another federal, state or local crime.

The defendant shall not possess a firearm or destructive device, as defined in 18 U.S.C. Section 921.

The defendant shall refrain from any unlawful use or possession of a controlled substance.

The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall cooperate in the collection of DNA, as directed by the probation officer.

The defendant shall participate in an outpatient treatment program approved by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

The defendant must contribute to the cost of services rendered based on his ability to pay and the availability of third-party payments.

The Court authorizes the release of available drug treatment evaluations and reports, including the presentence investigation report, to the substance abuse treatment provider.

The defendant must submit his person, residence, place of business, vehicle and any property or electronic devices under his control to a search on the basis that the probation officer has reasonable suspicion that contraband or evidence of a violation of the conditions of his supervised release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant must inform any other residents that the premises may be subject to search pursuant to this condition.

The defendant must participate in a mental health treatment program, as directed by the probation officer.

It is further ordered that the defendant shall pay to the United States a special assessment of $100, which shall be due immediately.

I've already explained the reasons for the sentence.

Does either counsel know of any legal reason that the sentence should not be imposed as I've so stated it?

MR. COHEN: No, your Honor.

MS. QIAN: No, your Honor.

THE COURT: OK. I'll order the sentence to be imposed as I so stated for all the reasons that I've explained.

There's no waiver, correct?

MR. COHEN: That's correct, your Honor.

THE COURT: OK.

Mr. Ferrer, you have the right to appeal the sentence. The notice of appeal must be filed within 14 days after the entry of the judgment of conviction. The judgment of conviction is entered promptly after the judge announces the sentence, so you should discuss this issue promptly with your lawyer. If you cannot pay the cost of appeal, you have the right to apply for leave to appeal *in forma pauperis*. If you request, the clerk will prepare and file a notice of appeal on your behalf immediately.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: OK.

Open counts?

MS. QIAN: None, your Honor.

THE COURT: But as a matter of prudence, the government asks that all open counts be dismissed, right?

MS. QIAN: Yes, your Honor.

THE COURT: And the defense agrees.

MR. COHEN: Yes, your Honor.

THE COURT: All open counts dismissed on the motion of the government.

Anything further?

MR. COHEN: Nothing from Mr. Ferrer.

Thank you very much, your Honor.

MS. QIAN: Nothing for the government, your Honor.

THE COURT: OK. Good afternoon, all. (Adjourned)

Exhibit K

06/03/2021

To Whom It May Concern, I am Nadine Allen the mother of Dave Minter, he is the youngest of my three children. Dave has always been a loving and caring child, he has always done sports and dancing events in school. He always helped around the house and did his chore's. When he was 10 month's old he had gotten lead poison and it was very high. When he was in public school he was diagnose with dyslexia and they put him in special Education. He started working summer youth at 14 to 18. He even sometimes

Came to my job and wrapped meat and swept floor and helped stacked. He worked with his father doing roofing, he worked cleaning court houses at night, he worked at a manhattan restuarant at night. He worked delivering pizza too. He has three children age 17, 13, and 1. He loves his kids so very much. He has spent time with his 17 year old the most because I had custody of her two times. He lived with his 13 years old for quite sometive theydo tell me all the time that they miss him very much. I was just diagnose with stage 3 breast cancer

and do miss my son with all my heart, as a mother you know how it is now being able to have your child around. He is not a bad person I just think sometimes these street are challenging, but he does want to be home to finish raising his children.

Thank you.

Nadine Allen 06-03-2

[redacted]

Bronx, N.Y. 10458

Exhibit L

June 22, 2021

To Whom it May Concern,

I am Dave Minter's father Morris Minter, My son is a loving and caring person to me and everyone he meets. I have had my own problems in and out of prison, and in and out of his life. I think sometimes it reflects his own life. I love my son very much and I know somehow he can turn his life around like I have done. Nothing has been more important to him than his family. He has the

support he needs and we are here for him every step of the way.

Thank you
Tamara Mack
347 468 0040

Exhibit M

6.9.21

To whom it may Concern:

My name is Julia Fowler. I live at [redacted]

I am writing this letter For Dave minter. I have the pleasure of knowing Dave For over Twenty years. Dave have watched my son many times. while I worked. Mr Minter is a very caring and loving Person. He is always willing to help someone in they time of need.

IF you have any questions Please feel free to call me at 646.417.0781

Sincerly yours
Julia Fowler
Julia Fowler

Exhibit N

Dave Minter is a really nice person I knew him since 2007 and he always helped me out he was always there for me he's actually one of my best friends He's a really nice person and he helps me at work he helps me at my house when I need things fixed he helps my mom out when she needs to go grocery shopping and he just does a lot for my family and I really do appreciate the person he you can me at 718 219 7118

~Sara Brock

Exhibit O

06-07-21

To whom it May Concern, I
an a friend of Dave Minter, he
is and always has been a good
child, to his mother and father.
he is respectfull and always has bee
Polite, to Me and My Family

Thank You

Yeimy GARCIA

347-520-1188